Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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General Application Principles

POLICY STATEMENTS

Seventh Circuit holds that district courts "must follow policy statements unless they contradict a statute or the Guidelines." Defendant's five-year term of supervised release was revoked for drug possession. Under 18 U.S.C. § 3583(g), he was subject to a prison term of not less than 20 months. Under the Guidelines he was subject to a 12–18 month term, or 20 months in light of the mandatory term under § 3583(g). *See* §§ 7B1.3, 7B1.4(a) & (b)(2), p.s. The government argued that the Chapter Seven policy state-ments were merely advisory, not binding. The district court agreed and sentenced defendant to 36 months.

The appellate court remanded: "Both parties agree that the correct interpretation of this policy statement leads to the conclusion that the district court must sentence Lewis to 20 months imprisonment—no more and no less. . . . While we may have been previously inclined to accept the proposition that policy statements are merely advisory, . . . this view has been explicitly rejected by . . . *Stinson v. U.S.*, 113 S. Ct. 1913 (1993). In reaching its holding that sentencing guideline com-mentary is binding, unless contrary to statute or the Guidelines themselves, the Court [stated]: 'The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.' *Id.* at 1917." Therefore, "we are compelled to hold that the district court erred by not sentencing Lewis to 20 months imprisonment, absent a departure. . . . U.S.S.G. sec. 7B1.4(b)(2) does not conflict with any statute or the Guidelines themselves. Consequently, Lewis must be resentenced."

U.S. v. Lewis, No. 92-2586 (7th Cir. July 8, 1993) (Kanne, J.).

Note: This appears to be the first circuit to hold that the Chapter Seven policy statements must be followed. Most of the circuits had held, prior to *Stinson*, that Chapter Seven must be considered but is not binding. See *Outline* generally at VII.

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Mergerson, No. 92-1179 (5th Cir. July 12, 1993) (King, J.) (Remanded: For defendant convicted of conspir-acy to distribute heroin, it was error to use amounts he negotiated to sell to find him responsible for over one kilogram of heroin and thus subject to the statutory minimum term under 21 U.S.C. § 841(b)(1)(A)(i). Although negoti-ated amounts are used under the Guidelines, see § 2D1.1, comment. (n.12), "§ 841(b)(1)(A)(i) requires that drug quantities actually be possessed with the intent to distribute—rather than merely being negotiated—[and] the district court's findings for purposes of guidelines sentencing are in large part inapplicable to the court's separate findings pursuant to § 841(b)(1)(A)(i)." Therefore, "the district court had to find . . . that Mergerson actually possessed or conspired . . . to actually possess over a kilogram of heroin during the conspiracy . . . . Mere proof of the amounts 'negotiated' with the undercover agents . . . would not count toward the quan-tity of heroin applicable to the conspiracy count.").

See *Outline* at II.A.3 and B.4.a.

Departures

SUBSTANTIAL ASSISTANCE

Third Circuit holds government may not deny § 5K1.1 motion to penalize defendant for exercising right to trial. The government offered to move for a substantial assistance departure if defendant pled guilty to mail fraud and money laundering charges. Defendant refused to plead to money laundering because he believed the statute did not apply to his conduct. The government responded by "withdraw[ing] the proposed § 5K1.1 plea agreement offer based on [defen-dant's] refusal to plead," and added that it also had "serious reservations" about defendant's truthfulness, which could al-so preclude a § 5K1.1 motion. Defendant was convicted on all counts and no § 5K1.1 motion was made. Defendant claimed the district court could depart under *Wade v. U.S.*, 112 S. Ct. 1840 (1992), because the government had an unconstitutional motive for denying the motion—to penalize him for going to trial. He also claimed that his assistance was equal to or greater than that of two defendants who pled guilty and received departures. The district court denied defendant's request, stating that *Wade* did not prohibit the government's action.

The appellate court remanded: "The Court in *Wade* stated that a district court may grant relief to a defendant if the prosecutor has 'an unconstitutional motive' for withholding a § 5K1.1 motion. . . . [I]t is an elementary violation of due process for a prosecutor to engage in conduct detrimental to a criminal defendant for the vindictive purpose of penalizing the defendant for exercising his constitutional right to a trial."

On remand, defendant can attempt to prove prosecutorial vindictiveness. He is not entitled to a presumption of vindictiveness, however, "because the government has proffered legitimate reasons . . . for its refusal to file a 5K1.1 motion," namely, that defendant's assistance was not, in fact, substantial. Thus, defendant "must prove actual vindictiveness in order to prevail. . . . [H]e must show that the prosecutor withheld a 5K1.1 motion solely to penalize him for exercising his right to trial," and this requires showing "that the government's stated justifications . . . are pretextual."

U.S. v. Paramo, No. 92-1861 (3d Cir. July 7, 1993) (Cowen, J.).

See *Outline* at VI.F.1.b.iii.

Fifth Circuit remands refusal to file § 5K1.1 motion because "significant ambiguities" in the plea agreement require a determination of the intent of the parties. Defendant entered into a plea agreement with the government. At defendant's rearraignment, the government told the district

court "that it is implicit although not spelled out in the agreement that if Mr. Hernandez should provide substantial assistance to the Government, . . . that the Government may make a motion for downward departure at sentencing." Defendant provided information, but the government claimed the assistance was insubstantial and did not file a motion. Defendant claimed that he provided the government with all the information it requested, but the government did not follow up on it and did not give him an opportunity to provide more assistance. Defendant was sentenced to the statutory minimum after refusing the chance to withdraw his plea.

The appellate court remanded, holding that the district court must determine whether the government's conduct was consistent with the parties' reasonable understanding of the plea agreement, which in this case involves "the parties' interpretation of what might constitute substantial assistance." Here, "it is unclear from the record what more Hernandez could have provided—or, more to the point, what more the government could possibly have contemplated that he would provide—in order to earn a motion for downward departure." The Fifth Circuit has held that when a defendant accepted a plea agreement in reliance on government representations "and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obliged to move for a downward departure." *See U.S. v. Melton,* 930 F.2d 1096, 1098–99 (5th Cir. 1991) [*4 GSU* #5].

As to whether the government's use of "may" instead of "shall" move for departure gave it greater discretion, the court stated: "We find it difficult if not impossible to believe that any defendant who hopes to receive a [§ 5K1.1 motion] would knowingly enter into a plea agreement in which the government retains unfettered discretion to make or not to make that motion, even if the defendant should indisputably provide substantial assistance. On remand . . . , the government should not be heard to make the legalistic argument that merely by using the word 'may' the government is free to exercise the prosecutor's discretion whether to make the motion . . . . Frankly, we are incredulous that any defendant would consciously make such an obviously bad deal absent some extremely compelling need to plea rather than stand trial."

U.S. v. Hernandez, No. 92-7485 (5th Cir. July 7, 1993) (Weiner, J.).

See *Outline* at VI.F.1.b.ii.

U.S. v. Dixon, No. 92-5780 (4th Cir. July 2, 1993) (Hall, J.) (Remanded: The government breached the plea agreement by not making a § 5K1.1 motion. The agreement stated that if defendant's "cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person," the government would make the mo-tion. The government "repeatedly conceded" defendant had, in fact, substantially assisted an investigation, but wanted to withhold the motion until defendant assisted in a future trial. Noting that the agreement provided for assistance in the investigation *or* prosecution of another, the appellate court held that "the government has no right to insist on assistance in both investigation and prosecution . . . . Dixon's providing substantial assistance in the investigation of another person has already triggered the government's duty under the plea agreement . . . . Dixon is entitled to specific performance.").

See *Outline* at VI.F.1.b.ii.

U.S. v. Beckett, No. 92-5091 (5th Cir. July 7, 1993) (DeMoss, J.) (Remanded: Although the government specified it was moving under § 5K1.1 only and not for a departure from the statutory minimum under 18 U.S.C. § 3553(e), the district court had discretion to depart below the statutory minimum. "[O]nce the motion is filed, the judge has the authority to make a downward departure from any or all counts, without regard to any statutorily mandated minimum sentence. We see nothing in these provisions that causes us to believe that Congress intended to permit the government to limit the scope of the court's sentencing authority by choosing to package its substantial assistance representation in a 5K1.1 motion rather than a 3553(e) motion.").

See *Outline* at VI.F.3.

Adjustments

Acceptance of Responsibility

U.S. v. Clemons, No. 92-6285 (6th Cir. July 19, 1993) (Milburn, J.) (Affirmed: Adopting the reasoning of *U.S. v. Frazier,* 971 F.2d 1076, 1084 (4th Cir. 1992), the appellate court held that "conditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege against self-incrimination does not penalize the defendant for assertion of his right against self incrimination in violation of the Fifth Amendment." Thus, it was proper to deny the § 3E1.1 reduction to a defendant who accepted responsibility for the offense of conviction but refused to admit to related conduct. The court noted, however, that the 1992 amendments to § 3E1.1 and Application Note 1(a), which did not apply to defendant, "'would appear to preclude the Fifth Amendment issue from arising in the future . . . .' *U.S. v. Hicks,* 978 F.2d 722, 726 (D.C. Cir. 1992)."). *See also U.S. v. March,* No. 92-3343 (10th Cir. July 9, 1993) (Logan, J.) (Affirmed: § 3E1.1 reduction properly denied to defendant who followed advice of counsel and refused to discuss circumstances of offense with probation officer preparing presentence report, claiming he might incriminate himself and destroy basis for appeal.). *But see U.S. v. LaPierre,* No. 92-10321 (9th Cir. July 12, 1993) (Norris, J.) (Remanded: District court may not deny § 3E1.1 reduction because defendant claimed privilege against self-incrimination and refused to discuss facts with probation officer and planned to appeal—exercise of constitutional rights may not be weighed against defendant.).

See *Outline* at III.E.2 and 3.

Role in the Offense

U.S. v. Webster, No. 90-50699 (9th Cir. June 11, 1993) (per curiam) (Remanded: District court should consider whether defendant qualifies for minor participant adjustment—based on all relevant conduct—for his role as a courier. However, downward departure may not be considered under *U.S. v. Valdez-Gonzalez,* 957 F.2d 643 (9th Cir. 1992), which held that departure for a drug courier may be appropriate if the courier was the only "participant" in the offense of convic-tion. The Nov. 1990 amendment to § 3B's Introductory Com-mentary, which states that relevant conduct should be used for role in offense adjustments, effectively overturned the reasoning of *Valdez-Gonzalez,* which focused on the fact that the earlier version of § 3B1.2 did not adequately account for a defendant's role in relevant conduct.).

See *Outline* at III.B.5.

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Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Fourth Circuit holds Guidelines' reasonable foreseeability analysis should be used to determine drug quantities for mandatory minimum sentences under 21 U.S.C. § 841(b). Two defendants in a large drug conspiracy were subject to ten-year minimum terms if they were held responsible for the full amount of drugs distributed by the conspir-acy. 21 U.S.C. §§ 846 and 841(b). However, under the Guidelines' reasonable foreseeability analysis a smaller quantity of drugs would be attributed to them and their sentences would be significantly lower. The district court sentenced them to the mandatory term using the full amount from the conspiracy, but also imposed alternative sentences under the Guidelines.

The appellate court held that it was improper to automatically use the full amount of drugs from the conspiracy for purposes of the mandatory minimum. The court looked to the statutes and legislative history to "conclude that the most reasonable interpretation of the relevant statutory provisions requires a sentencing court to assess the quantity of narcotics attributable to each coconspirator by relying on the principles set forth in *Pinkerton* [*v. U.S.*, 328 U.S. 640 (1946)]." To hold a defendant liable for acts of other conspirators under *Pinkerton*, "the act must be 'done in furtherance of the conspiracy' and 'be reasonably foreseen as a necessary or natural consequence of the' conspiracy."

The relevant conduct section of the Guidelines "incorporates the concept of reasonable foreseeability as described in *Pinkerton*" and should be used to "determine the application of § 841(b) for a defendant who has been convicted of § 846." The court held that "in order to apply § 841(b) properly, a district court must first apply the principles of *Pinkerton* as set forth in the relevant conduct section of the Sentencing Guidelines, U.S.S.G. § 1B1.3, to determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement. If that amount satisfies the quantity indicated in § 841(b), the district court must impose the mandatory minimum sentence absent a higher sentencing range resulting from application of the Sentencing Guidelines. If the quantity is less than that set forth in § 841(b), the statutory mandatory minimum sentencing provision would not apply."

The court held that the alternative sentences imposed under the Guidelines in this case were proper, and remanded for amendment of the judgments.

U.S. v. Irvin, No. 91-5454 (4th Cir. Aug. 23, 1993) (Wilkins, J.).

See *Outline* at II.A.2 and 3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Johnson, No. 91-1621 (7th Cir. July 29, 1993) (Lay, Sr. J.) (Remanded: For defendant convicted of possession with intent to distribute cocaine, it was error to include the weight of waste water in which a small amount of cocaine base was mixed. "The waste water does not serve as a dilutant, cut-ting agent or carrier medium for the cocaine base. It does not 'facilitate the distribution' . . . of the cocaine in that cocaine is not dependent on the water for ingestion, and unlike a dilutant or cutting agent, the waste water does not in any way increase the amount of drug available at the retail level. The liquid, with just a trace of cocaine base, is merely a by-product of the manufacturing process with no use or market value. . . . To read the statute or *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] as requiring inclusion of the weight of all mixtures, whether or not they are useable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent.").

See *Outline* at II.B.1.

General Application Principles

SENTENCING FACTORS

D.C. Circuit holds en banc that, after granting a reduction for acceptance of responsibility, the sentencing court may consider defendant's decision to go to trial when picking the sentence within the guideline range. Defendant was convicted at trial on a drug charge. The district court granted a § 3E1.1 reduction, but expressed reservations about giving defendant the full benefit of the two-point reduc-tion in light of his going to trial when "he, in effect, had no defense," and later made a "rather meager" acknowledgment of responsibility. The court stated that, if defendant had pled guilty before trial, it would "have sentenced him at the very bottom of the Guidelines," but because "the case did go to trial, I am going to add an additional six months to the guideline sentence that I intend to impose," and sentenced defendant to 127 months instead of 121. The original appellate panel affirmed, rejecting defendant's claim that he was punished for exercising his Sixth Amendment right to trial. *U.S. v. Jones*, 973 F.2d 928 (D.C. Cir. 1992) [5 *GSU* #3].

The en banc court affirmed, "although on narrower grounds. . . . [I]t is clear . . . that the district judge could not properly be described as enhancing defendant's punishment. Instead, in considering appellant's decision to admit guilt only after conviction, the judge merely viewed the appellant's timing as pertinent to the scope of the benefit he should receive. The judge decided he should give appellant less of a benefit than he would have allowed an otherwise identical defendant who showed greater acceptance of responsibility by acknowledging his guilt at an earlier stage."

The court added that, looking at the pre-adjustment guideline range as a "baseline sentence," "the sentencing judge appears simply to have given the defendant four-fifths of the possible credit for acceptance of responsibility (24 out of 30 possible months), explaining that if Jones had shown greater evidence of contrition (in this instance by pleading guilty), the judge would have made a greater adjustment." It was "legally relevant (and constitutionally unobjectionable)" for the district judge to conclude that, "within the 121–151 month range the

judge was bound to work within, Jones's limited remorse deserved only a 24-month reduction."

U.S. v. Jones, No. 91-3025 (D.C. Cir. July 2, 1993) (en banc) (Williams, J.) (three judges dissenting).
See *Outline* at I.C and III.E.4.

Relevant Conduct

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Remanded: It was error to attribute to defendant all drugs distributed by the conspiracy on the basis that defendant "certainly could have reasonably foreseen" such amounts: "foreseeability is only one of the limitations on the ability of the court to charge one participant in a conspiracy with the conduct of the other participants. . . . Another limi-tation on the court's ability to charge a defendant with the conduct of others is that the conduct must be in furtherance of the execution of the 'jointly undertaken criminal activity.'" Thus, the district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake.").
See *Outline* at I.A.1 and II.A.2.

Departures

Mitigating Circumstances

U.S. v. Restrepo, No. 92-1631 (2d Cir. July 26, 1993) (Kearse, J.) (Remanded: Although consideration of alienage is not prohibited by the Guidelines, it was improper to depart downward for defendant who faced deportation and other collateral consequences due to his status as a permanent resident alien. Consideration of "national origin" is prohibited by § 5H1.10, p.s., but national origin "is not synonymous with 'alienage,' i.e., simply not being a citizen of the country in which one is present. . . . Thus, the prohibition against consideration of national origin does not constitute a prohibition against consideration of alienage. . . . [T]o the extent that alienage is a characteristic shared by a large number of persons subject to the Guidelines, it is a characteristic that, for sentencing purposes, is not 'ordinarily relevant.' It remains, however, a characteristic that may be considered if a sentencing court finds that its effect is beyond the ordinary" in nature or degree. In this case, however, "none of the bases relied on by the district court, i.e., (1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of sentence, and (3) the effect of deportation as banishment from the U.S. and separation from family, justified the departure."). *Cf. U.S. v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990) ("possibility of deportation is not a proper ground for departure"); *U.S. v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990) (reversed upward departure based on fact that anticipated deportation after release precluded imposition of fine or supervised release).
See *Outline* generally at VI.C.4.b.

U.S. v. Ziegler, No. 92-3242 (10th Cir. July 23, 1993) (Brorby, J.) (Remanded: District court improperly departed downward for defendant's post-offense drug rehabilitation. "[W]e hold drug rehabilitation is taken into account for sentencing purposes under U.S.S.G. 3E1.1 (1991) and, therefore, rehabilitation is generally an improper basis for departure." Even in extraordinary or unusual cases rehabilitation is not a proper basis for departure: "Although [§ 5H1.4, p.s.] explicitly refers to drug dependence, not drug rehabilitation, we interpret this section as encompassing both phenomena because drug rehabilitation necessarily presupposes drug dependence. . . . A departure based upon drug rehabilitation re-wards drug dependency because only a defendant with a drug abuse problem is eligible for the departure. For this reason, we hold the Guidelines do not contemplate drug rehabilitation as a grounds for departure even in rare circumstances.").
See *Outline* at VI.C.2.a.

U.S. v. Gaither, No. 92-3222 (10th Cir. July 23, 1993) (Brorby, J.) (Reversed, in light of *Ziegler*, departure based on post-offense drug rehabilitation, but remanded for further findings on defendant's claim that departure was also based on his "exceptional acceptance of responsibility." Such a departure is proper only if "the district court finds the acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by U.S.S.G. 3E1.1.").
See *Outline* at VI.C.4.c.

U.S. v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (Affirmed: "Applying the modified standard of review for such cases recently announced in *U.S. v. Rivera*," 994 F.2d 942 (1st Cir. 1993), the district court properly departed downward—from the 24–30 month range to probation with six months' home confinement—for defendant's unusual family circumstances. Defendant had been living with a divorced woman and her two children since 1989, and had developed a special relationship with the woman's son that had helped ameliorate the son's serious psychological and behavioral problems. Evidence that the son "would risk regression and harm if defendant were incarcerated amply supports the district court's deter-mination that Sclamo's relationship to James is sufficiently extraordinary to sustain a downward departure.").
See *Outline* at VI.C.1.a.

Determining the Sentence

Fines

U.S. v. Turner, No. 93-1148 (7th Cir. July 14, 1993) (Easterbrook, J.) (Remanded: The required cost-of-imprisonment fine, § 5E1.2(i), is authorized by statute. Case is remanded, however, because the district court imposed the fine after finding that defendant was unable to pay a punitive fine under § 5E1.2(a) and (c). Although the appellate court declined to hold that a cost-of-imprisonment fine may never be imposed unless a punitive fine is imposed first, it concluded that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under sec. 5E1.2(i).").
See *Outline* at V.E.2.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Sosa, 997 F.2d 1130 (5th Cir. 1993) (Affirmed: In sentencing defendant for revocation of probation for drug possession to "not less than one-third of the original sentence," 18 U.S.C. § 3565(a), "original sentence" refers to the length of probation and is not limited to the maximum original guideline sentence.).

Three courts have now held that "original sentence" refers to probation; four have held it is limited to the original guideline sentence. The Supreme Court granted certiorari in one of the latter cases. *See U.S. v. Granderson*, 113 S. Ct. 3033 (1993).
See *Outline* at VII.A.2.

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Criminal History

INVALID PRIOR CONVICTIONS

Sixth Circuit holds en banc that "a narrow window of challenge to prior convictions is available" to defendants sentenced under the Guidelines. Defendant challenged the validity of two prior state convictions for violent felonies that would have placed him in the career offender category. The district court held that the convictions were invalid under state law and defendant should not be sentenced as a career offender. The original appellate panel held that the validity of the convictions had to be determined not under state law but under federal constitutional standards, and remanded after finding that federal standards were not violated. That opinion was withdrawn for rehearing en banc "to decide whether a defendant may challenge at sentencing a prior state court conviction not previously ruled invalid which would result in a longer sentence if included within the Sentencing Guidelines calculus."

The majority of the en banc court held that "under certain limited circumstances it is within a sentencing court's discretion to entertain a challenge to the inclusion of a prior state conviction in a criminal history score. . . . [T]he defendant must first comply with the procedural requirements for objecting to the conviction's inclusion in the criminal history score. The defendant also must state specifically the grounds claimed for the prior conviction's constitutional invalidity in his initial objection and 'the anticipated means by which proof of invalidity will be attempted—whether by documentary evidence, including state court records, testimonial evidence, or combination—with an estimate of the process and the time needed to obtain the required evidence.' . . . An example of a challenge that a court should entertain would be a challenge to a previously unchallenged felony conviction where the defendant was not represented by counsel, counsel was not validly waived, and court records or transcripts are available that document the facts."

"In addition to the types of proof that will be offered, the court also should consider whether the defendant has available an alternative method for attacking the prior conviction either through state post-conviction remedies or federal habeas relief. While this factor should not be dispositive of whether a sentencing court should entertain such a challenge, the availability of an alternative method should play a significant role in the court's decision." The court stated that its holding is similar to the Fourth Circuit's approach that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) [5 *GSU* #15].

As to defendant's challenge, the en banc court held that the district court erred in finding that the prior convictions were invalid under state law: "When the inclusion of a prior state conviction in the criminal history score is challenged, the validity of that conviction must be determined solely as a matter of federal law." Holding that the convictions were valid under federal law, the court reversed and remanded.

Twelve of the fourteen members of the en banc court joined in the result. Six joined the opinion on the issue of what circumstances a district court must consider before allowing a challenge to prior convictions; one judge concurred but would allow district courts more discretion. Five judges would further limit such challenges. The two judges who dissented from the result would allow challenges to prior convictions as a matter of right, as in *U.S. v. Vea-Gonzalez*, 999 F.2d 1326 (9th Cir. 1993) (superseding 986 F.2d 321 [5 *GSU* #10]).

U.S. v. McGlocklin, No. 91-6121 (6th Cir. Sept. 17, 1993) (en banc) (Guy, J.) (dissenting opinions noted above).

See *Outline* at IV.A.3.

Sentencing Procedure

Eleventh Circuit holds that defendants may waive right to appeal Guidelines sentences, but the waiver must be specifically addressed in the plea colloquy. Defendant appealed his sentence. The government argued the appeal should be denied because defendant's plea agreement includ-ed a waiver of his "right to appeal or contest . . . his sentence on any ground," unless the sentence was in violation of law.

The appellate court held that, under most circumstances, "a defendant's knowing and voluntary waiver of the right to appeal his sentence will be enforced." However, "for a waiver to be effective it must be knowing and voluntary [and] . . . in most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court must have specifically discussed the sentence appeal waiver with the defen-dant during the Rule 11 hearing." To enforce a waiver, either the district court must have "specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy" or it must be "manifestly clear from the record that the defendant otherwise understood the full significance of the waiver."

Here, the court held the district court "did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances. . . . Nor does . . . the record [show] that Bushert otherwise understood the full significance of his sentence appeal waiver." The court concluded that "the remedy for an unknowing and involuntary waiver is essentially severance"—the waiver "is severed or disregarded . . . while the rest of the plea agreement is enforced as written and the appeal goes forward." The appellate court found defendant's claims of sentencing error had no merit and affirmed his sentence.

U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993).

Evidentiary Issues

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Affirmed: Cocaine excluded at trial because it was seized during an unconstitutional search was properly used to calculate defendants' offense levels. Evidence illegally seized for the purpose of sentence enhance-ment would be excludable, but there was "no indication in the record that this evidence was obtained to enhance defen-dants' sentences." The court distinguished as dicta the conclusion in *U.S. v. Nichols*, 979 F.2d 402, 410–11 (6th Cir. 1992), that unlawfully seized evidence should not be used in setting the base offense level.) (Keith, J., dissented on this issue).
See *Outline* at IX.D.4.

Adjustments

Use of Special Skill

U.S. v. Mainard, No. 92-10298 (9th Cir. Sept. 20, 1993) (Fernandez, J.) (Remanded: Enhancement under § 3B1.3 for use of special skill was improperly given for defendant's "sophistication in methamphetamine manufacturing" and "ability to pass his expertise along to others." There was "no evidence that Mainard was a trained chemist or pharmacist . . . who abused his skills to produce drugs." "Although the methamphetamine laboratory might have been sophisticated, nothing indicates that Mainard used any 'pre-existing, legitimate skill not possessed by the general public,'" and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under § 3B1.3.). *Accord U.S. v. Young*, 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant learned how to manufacture PCP—which by definition requires special skill—insufficient for § 3B1.1).

Compare U.S. v. Spencer, No. 93-1041 (2d Cir. Aug. 25, 1993) (Altimari, J.) (Remanded for recalculation of drug amount, but affirmed special skill enhancement for defendant convicted of methamphetamine offenses. Although "special skill" "usually requir[es] substantial education, training, or licensing," § 3B1.3, comment. (n.2), and defendant was self-taught, he "presents the unusual case where factors other than formal education, training, or licensing persuade us that he had special skills in the area of chemistry. . . . [He] experimented often as an amateur chemist . . . , built an extremely sophisticated home chemistry laboratory . . . , used his chemical acumen professionally . . . to conduct a joint project [with a chemist] to develop a sophisticated medical testing device," and had taken college courses.). *Accord U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor had acquired requisite "special skill" through experience).

See also U.S. v. Muzingo, 999 F.2d 361 (8th Cir. 1993) (Affirmed: Defendant used "special skill" to break into safe-deposit boxes He made keys to the boxes, "a skill that he acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys." There was also evidence he had technical drawings and a "little gadget" he used to determine the profile of the keys that he required.).
See *Outline* at III.B.9.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Truss, No. 92-2171 (6th Cir. Sept. 8, 1993) (Suhrheinrich, J.) ("[W]e find the majority's position persuasive and join [most circuits] in holding that, while an additional term of supervised release may be in the best interests of an orderly administration of justice, no additional term of supervised release is permitted by § 3583(e)(3)."). *Accord U.S. v. Tatum*, 998 F.2d 893 (11th Cir. 1993) (per curiam) (Remand-ed: "We join the majority of circuits that have addressed this issue and hold that upon revocation of a term of supervised release, a district court is without statutory authority to impose both imprisonment and another term of supervised release.").
See *Outline* at VII.B.1.

Offense Conduct

More than Minimal Planning

U.S. v. Wong, No. 92-5570 (3d Cir. July 30, 1993) (Mansmann, J.) (Affirmed: When appropriate, both enhancement for more than minimal planning and adjustment for role in offense may be given: "The upward adjustments mandated respectively by §§ 2B1.1(b)(5) and 3B1.1(c) operate independently of each other . . . . [W]e hold that where a defendant is not only a participant in a sophisticated criminal scheme, but is also one of the more culpable individuals in that scheme, the two enhancements may be applied in tandem.").

Contra U.S. v. Chichy, No. 92-3481 (6th Cir. Aug. 6, 1993) (Contie, Sr. J.) (Remanded: It is "impermissible double counting" to impose both enhancements. The appellate court held it was bound by *U.S. v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992), which held that separate enhancements under § 2F1.1(b)(2) and § 3B1.1(a) were improper. "We believe the same reasoning applies to subsection (c) of § 3B1.1. . . . Although it is possible for a defendant to receive an enhancement under § 2F1.1(b)(2) for more than minimal planning without being an organizer, leader, manager, or supervisor under § 3B1.1(c), the converse is not true. A defendant cannot receive an enhancement for role in the offense under § 3B1.1(c) unless he has engaged in more than minimal planning.").
See *Outline* at II.E and III.B.6.

Calculating the Weight of Drugs

U.S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993) (Remanded: *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), a drug importation case, applies to conspiracy to manufacture and possess cases. Thus, for defendants convicted of conspiracy to manufacture and possess methamphetamine, it was error to include amounts of discarded "sludge" that contained less than one percent methamphetamine and "were not only unusable, but also toxic." Courts may, however, use "the approximation approach" in § 2D1.1, comment. (n.12), if the amount of drugs seized does not reflect the scale of the offense and the evidence supports that method.).

Compare U.S. v. Nguyen, No. 92-8032 (10th Cir. Apr. 13, 1993) (Saffels, Sr. Dist. J.) (Affirmed: District court properly used entire weight of "a 10.3 gram 'eight-ball' comprised of small pieces of yellowish cocaine base mixed with white sodium bicarbonate powder." Defendant argued that crack cocaine is not usually combined with sodium bicarbonate powder, but the appellate court stated: "This is not an absurd case, but one in which the sodium bicarbonate could have remained after the distillation into the final cocaine base form. In addition, the defendant purchased the drug in this form and sold it in this form.") (previously unpublished table opinion, 991 F.2d 806, to be published in full).
See *Outline* at II.B.1.

Guideline Sentencing Update

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VOLUME 6 • NUMBER 4 • OCTOBER 14, 1993

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Second Circuit vacates mandatory minimum sentence that was based on inclusion of relevant conduct that was not part of the offense of conviction. Defendant was arrested in November 1991 and charged with possession of a firearm in connection with a drug trafficking offense and possession of cocaine with intent to sell. In February 1992, defendant was arrested again and charged with conspiracy to possess with intent to distribute and conspiracy to distribute cocaine. Pursuant to a plea agreement, he was convicted of the November weapons charge and the February charges; the November drug charge was dropped. In sentencing defendant on the February drug charges, which involved .431 grams of cocaine base, the district court included the 12.86 grams of cocaine base involved in the November transaction and sentenced defendant to the mandatory minimum five-year sentence for a conspiracy involving more than five grams of cocaine base, 21 U.S.C. §§ 841(b)(1) and 846.

The appellate court remanded, holding that the November drug amount could be included as relevant conduct in computing the guideline sentence, if appropriate, but could not be counted toward the mandatory minimum. "Unlike the Guidelines, which require a sentencing court to consider similar conduct in setting a sentence, the statutory mandatory minimum sentences of 21 U.S.C. § 841(b)(1) apply only to the conduct which actually resulted in a conviction under that statute. Thus, the district court erred in concluding that it should include the cocaine from the November episode not only as related conduct relevant to the base offense level for the February episode, but also in determining whether the mandatory minimum for the February offense applied. . . . [Section 841(b)(1)] indicates that the minimum applies to the quantity involved in the charged, and proven, violation of § 841(a). In this case, Darmand's violation of § 841(a) was found to involve only .431 grams. Consequently, the mandatory minimum should not have been imposed."

U.S. v. Darmand, No. 93-1009 (2d Cir. Sept. 8, 1993) (Oakes, J.).

See *Outline* at II.A.3.

DRUG QUANTITY—RELEVANT CONDUCT

U.S. v. Adams, 1 F.3d 1566 (11th Cir. 1993) (Remanded: In determining what drug amounts were reasonably foreseeable to conspiracy defendant who had participated in only one abortive flight to pick up marijuana, it was error to attribute to him "a hypothetical second load that [he] never attempted to transport." While it may sometimes be appropriate to hold a defendant liable for other flights, "[a] sentencing court may not speculate on the extent of a defendant's involvement in a conspiracy; instead, such a finding must be supported by a preponderance of the evidence . . . . There was no evidence that Adams intended to be involved with another flight or that it was foreseeable to him that there would be another flight."). See *Outline* at II.A.1.

Criminal History

CONSOLIDATED OR RELATED CASES

Seventh Circuit holds that there must have been a formal consolidation order or other judicial determination for prior convictions to be "consolidated for sentencing." The district court sentenced defendant as a career offender after finding that two of defendant's prior convictions for bank robbery—which had been charged in the same indictment—were related, but that a third, separately indicted robbery was not. Defendant argued that the convictions had been "consolidated for sentencing," § 4A1.2, comment. (n.3). "Both indictments were returned by the same grand jury at the same time. The cases, which had separate docket numbers, were assigned to the same judge and identical bonds were set. The charges proceeded together through arraignment, motions, motion hearing, plea agreement, plea hearing, sentence hearing, and subsequent sentence modification. All three offenses . . . were the subject of Russell's plea agreement. Russell received 15-year concurrent sentences for each of the three offenses, in separate orders, but one order referring to the separate cases by number modified the sentences to ten years on each count." The district judge determined that the separate offenses, indictments, minute sheets, judgments, and convictions "do not suggest consolidation." Also, there was no formal consolidation order, and the two robberies in the first indictment were committed by defendant alone while the third was by defendant and his brother.

The appellate court affirmed, noting initially that Application Note 3 is binding and thus consolidated sentences must be treated as related, but that "the commentary does not answer the question of when sentences should be deemed to have been 'consolidated' for sentencing." The court concluded that "the purpose of the guideline would best be implemented by requiring either a formal order of consolidation or a record that shows the sentencing court considered the cases sufficiently related for consolidation and effec-tively entered one sentence for the multiple convictions. . . . In other words, there must be a judicial determination by the sentencing judge that the cases are to be consolidated, treated as one, for sentencing purposes. Consolidation should not occur by accident through the happenstance of the schedul-ing of a court hearing or the kind of papers filed in the case or the administrative handling of the case."

In this case, although there were "many characteristics of a consolidated sentencing," the district court "did not err in treating the two separate indictments as 'unrelated.'" The appellate court found that "there was no showing that there was

a request in the plea agreement that the cases be consolidated for sentencing purposes. The cases were continually treated as separate except for the various court proceedings being held at the same time before the same judge. . . . There is nothing in the record to indicate that the district court considered or made a determination that the cases were so related that they should be consolidated for sentencing purposes because one overall sentence would be appropriate for the three crimes, or that, except for the concurrent provision, the sentence for one conviction was somehow affected by the conduct under the other charge. At each hearing the two indictments were treated as separate cases, and there is nothing to show that the sentence for any charge would have been different if the cases had been heard on different days before different judges at entirely separate sentencing hearings."

U.S. v. Russell, 2 F.3d 200 (7th Cir. 1993).

See *Outline* at IV.A.1.c.

Career Offender Provision

U.S. v. Hayes, No. 91-30432 (9th Cir. Oct. 8, 1993) (Order amending original opinion at 994 F.2d 714, to remove holding that the offense of felon in possession of a sawed-off shotgun is a crime of violence: "Because we hold that possession of an unregistered sawed-off shotgun is a crime of violence, we need not decide whether being a felon in possession of a sawed-off shotgun is a crime of violence." Defendant's status as career offender is reaffirmed.).

Note to readers: This affects the entries for *Hayes* in 5 *GSU* #14 and *Outline* at IV.B.1.b.

General Application Principles

Relevant Conduct

U.S. v. Carrozza, No. 92-1798 (1st Cir. Sept. 16, 1993) (Campbell, Sr. J.) (Remanded: In sentencing RICO defendant, district court erred in "conclud[ing] that relevant conduct in a RICO case was, as a matter of law, limited to the specific predicate acts charged against the defendant . . . and conduct relating to the charged predicates. . . . We hold that relevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs." Also, "the term 'underlying racketeering activity' in § 2E1.1(a)(2) means simply any act, whether or not charged against the defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. § 1961(1) and is otherwise relevant conduct under § 1B1.3." However, the statutory maximum sentence, which for RICO can be increased depending on the seriousness of the underlying racketeering activity, "must be determined by the conduct alleged within the four corners of the indictment," and uncharged relevant conduct affects only where defendant is sentenced within the statutory range.).

See *Outline* generally at I.A.4.

Departures

Mitigating Circumstances

U.S. v. Benish, No. 92-3311 (3d Cir. Sept. 16, 1993) (Sloviter, C.J.) (Affirmed: "The exclusive focus [in § 2D1.1] on the number of marijuana plants leads us to conclude that the Commission considered and rejected any other factors. Thus, we see no basis on which a district court could conclude that the age or sex of particular marijuana plants are factors that have not 'adequately' been considered by the Commission. . . . We see nothing atypical or unusual in the fact that the particular plants here were male, old, and possibly weak."). *Cf. U.S. v. Upthegrove*, 974 F.2d 55, 56 (7th Cir. 1992) (poor quality of marijuana is not ground for downward departure).

See *Outline* at II.B.2 and VI.C.4.b.

U.S. v. Hadaway, 998 F.2d 917 (11th Cir. 1993) (Remanded: Defendant, who pled guilty to possession of an unregistered sawed-off shotgun, claimed the district court erred by refusing to consider a downward departure on the grounds that his conduct was "outside the heartland" of such cases, did not cause the harm the law was intended to prevent (he averred that he acquired the gun on a whim, meant to keep it as a curiosity or for parts, and did not even know if it worked), and the rural community in which he lives considers the sentence to be excessive. The appellate court remanded because "it is clear that the district court had the authority to depart downward if it were persuaded that Hadaway's case truly was 'atypical . . . where conduct significantly differs from the norm,' U.S.S.G. Ch. 1, Pt. A, n.4(b), or that Hadaway's conduct threatened lesser harms, U.S.S.G. § 5K2.11," p.s. However, departure cannot be based on the community's view of the crime: "[W]e join the First and Fifth Circuits in holding that departures based on 'community standards' are not permitted." *See U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990) (rejecting upward departure for community standards); *U.S. v. Aguilar-Pena*, 887 F.2d 347 (1st Cir. 1989) (same).).

See *Outline* at VI.B.2 and VI.C.4.b.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Levi, 2 F.3d 842 (8th Cir. 1993) (Affirmed: Ex Post Facto Clause is not violated by application of amended revocation policy statements, § 7B1 (Nov. 1990), to defendant who committed the underlying offense before the amendments but violated his supervised release afterwards: "This court has found that the sentencing court is required only to 'consider' Chapter 7 policy statements. . . . Being merely ad-visory, a Chapter 7 policy statement is not a law within the meaning of the Ex Post Facto Clause. . . . Consequently, the fact that the district court considered a Chapter 7 policy state-ment that had been amended subsequent to Levi's initial sentencing does not implicate the Ex Post Facto Clause."). *See also U.S. v. Schram*, No. 92-30023 (9th Cir. July 22, 1993) (Farris, J.) (Affirmed: District court correctly applied Nov. 1990 version of § 7B1 even though defendant's underlying offense occurred before then: "Sections 7B1.3 and 7B1.4 were amended before Schram violated the terms of his supervised release. They were not applied 'retroactively' because they were not applied to conduct completed prior to their enactment."). *Cf. U.S. v. Bermudez*, 974 F.2d 12, 13–14 (2d Cir. 1992) (per curiam) (consider Chapter 7 policy statements after revocation of supervised release even though defendant was originally sentenced before effective date of Guidelines).

See *Outline* generally at VII.

Certiorari Granted:

U.S. v. Nichols, 979 F.2d 402 (6th Cir. 1992), *cert. granted*, No. 92-8556 (Sept. 28, 1993). Issue: Whether a prior uncounseled misdemeanor conviction can be used in calculating defendant's criminal history score.

See *Outline* at IV.A.5.

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VOLUME 6 • NUMBER 5 • NOVEMBER 2, 1993

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Ninth Circuit holds that, for mandatory minimum sentences, conspiracy drug amounts should be determined under Guidelines' reasonable foreseeability analysis, regardless of amounts specified in the indictment. Defendants were convicted of conspiracy to distribute cocaine and heroin. The conspiracy count specified that at least one kilogram of heroin and five kilograms of cocaine were involved in the conspiracy, and the sentencing court ruled that it was not free to determine whether defendants were responsible for smaller amounts for purposes of the statutory minimum under 21 U.S.C. § 841(b)(1)(A).

The appellate court held this was error and remanded for one defendant (the error was held harmless for the other defendant). The mandatory sentence under "§ 841(a) does not alter the court's responsibility to assess a defendant's 'individual . . . level of responsibility' for the amount of drugs involved in an offense by determining, in accord with the Guidelines, the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty."

"The sentencing court's responsibility to determine the quantity of drugs attributable to a defendant is not altered by the fact that the amount involved in a drug conspiracy is specified in the indictment. Quantity is not an element of a conspiracy offense. . . . The drug amount attributable to a defendant for purposes of sentencing is not established merely by looking to the amount of drugs involved in the conspiracy as a whole, '[u]nder the Guidelines each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.'. . . [I]t is not relevant for sentencing purposes whether or not an indictment specifies the amount alleged in the conspiracy."

U.S. v. Castaneda, No. 92-30077 (9th Cir. Oct. 5, 1993) (Nelson, J.).

See *Outline* at II.A.2 and 3 and summary of *Irvin* in 6 *GSU* #2.

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Palacios-Molina, No. 92-2887 (5th Cir. Oct. 27, 1993) (Johnson, J.) (Remanded: Weight of liquid that cocaine was dissolved in for transport should not be included. "The cocaine in the present case was not a usable substance while it was mixed with the liquid in the bottles. Only after the liquid was distilled out would it be ready for either the wholesale or retail market. . . . Thus, as this liquid was not part of a marketable mixture, it is not implicated under the market-oriented analysis in *Chapman [v. U.S.*, 111 S. Ct. 1919 (1991)] and should not have been considered part of a mixture . . . under § 2D1.1. . . . For sentencing purposes, the method of transporting the drugs is unimportant. Rather, it is the amount of that commodity trafficked that counts.").

U.S. v. Killion, No. 92-3130 (10th Cir. Oct. 13, 1993) (Alley, Dist. J.) (Affirmed: Holding that *Chapman v. U.S.*, 111 S. Ct. 1919 (1991), did not change circuit precedent for determining weight of amphetamine precursor mixture: "we today again hold that so long as a mixture or substance contains a detectable amount of a controlled substance, its entire weight, including waste by-products of the drug manufacturing process, may be properly included in the calculation of a defendant's base offense level under § 2D1.1."). *Accord U.S. v. Innie*, No. 92-50239 (9th Cir. Oct. 5, 1993) (O'Scannlain, J.) (for methamphetamine).

See *Outline* at II.B.1, summaries of *Newsome* and *Nguyen* in 6 *GSU* #3, *Johnson* in 6 *GSU* #2, and list of amendments below.

LOSS

U.S. v. Lowder, No. 92-6378 (10th Cir. Sept. 17, 1993) (Kelly, J.) (Affirmed: It was proper to include in the loss calculation the interest that could have been earned on fraudulently obtained funds where defendant had guaranteed investors a 12% rate of return. Section 2F1.1, comment. (n.7), states that loss does not include "interest the victim could have earned on such funds had the loss not occurred," which the appellate court interpreted "as disallowing 'opportunity cost' interest, or the time-value of money stolen from victims. Here, however, Defendant defrauded his victims by promising them a guaranteed interest rate of 12%. He induced their investment by essentially contracting for a specific rate of return. He also sent out account summaries, showing the interest accrued on their investment. This is analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss. *See U.S. v. Jones*, 933 F.2d 353 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers).").

See *Outline* at II.D.2.b.

Departures

CRIMINAL HISTORY

U.S. v. Carr, No. 92-3767 (6th Cir. Sept. 28, 1993) (Ryan, J.) (Remanded: Extent of upward departure for defendant whose criminal history category was VI should not have been calculated by using hypothetical category IX based on 20 criminal history points. Although this methodology was previously accepted, the Nov. 1992 amendment to § 4A1.3, p.s., "disapprove[d] of this method . . . . Thus, instead of hypothesizing a criminal history range more than VI, the Guidelines require a sentencing court to look to the other axis and consider available ranges from higher offense levels." Here, defendant's "offense level would have to be increased from 18 to 21" to receive the sentence imposed. If the district court resentences defendant to the same sentence using offense level 21, "it must demonstrate why it found the sentence imposed by each intervening level to be too lenient.").

See *Outline* at VI.A.4.

U.S. v. Carrillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (Remanded: Departure above criminal history category VI for defendant with 19 criminal history points was improper because his "criminal history is simply not serious enough to justify a departure." Under § 4A1.3, p.s., "a court should not depart unless the defendant's record is 'significantly more serious' than that of other defendants in the same criminal history category. . . . However, defendants in category VI are by definition the most intractable of all offenders. The record does not reflect that Carillo, among all those in that criminal history category, has a criminal record so serious, so egregious, that a departure is warranted. . . . The sheer number of a defendant's criminal history points is not, so to speak, the point. A sentencing court must look, rather, to the defen-dant's overall record. . . . We emphasize, as does the Sentencing Commission, that a departure from category VI is warranted only in the highly exceptional case.").
See *Outline* at VI.A and A.4.

Aggravating Circumstances

U.S. v. Schweitzer, No. 92-5713 (3d Cir. Sept. 16, 1993) (Stapleton, J.) (Remanded: For defendant convicted of conspiring to bribe a public official to secure confidential information from the Social Security Administration, it was error for the district court to base an upward departure partly on defendant having given multiple media interviews "as well as telling about what he had done and, on the Oprah Winfrey Show, how much money he got out of it, and bragging or predicting that he would get probation." There were other factors that warranted departure, such as defendant's "corruption of a government function" and the "loss of public confidence," see § 2C1.1, comment. (n.5), but "it was inappropri-ate for the district court . . . to take into account Schweitzer's media efforts to call attention to the alleged ease of acquiring confidential information held by the government," "a situation that is unquestionably a matter of public concern.").
See *Outline* generally at VI.B.2.

Determining the Sentence

Fines

U.S. v. Norman, 3 F.3d 368 (11th Cir. 1993) (per curiam) (Remanded: "Section 5E1.2(i)'s plain language imposing costs of imprisonment and supervision as an additional fine amount supports the holding of the courts in *Labat, Corral,* and *Fair* that such additional fine may not be imposed unless a [punitive] fine pursuant to § 5E1.2(a) is also imposed."). *Contra U.S. v. Favorito,* No. 92-50465 (9th Cir. Sept. 28, 1993) (Brunetti, J.) (Affirmed: Adopting *U.S. v. Turner,* 998 F.2d 534, 538 (7th Cir. 1993) [6 *GSU* #2]: "The district court did not err in imposing a fine of costs of imprisonment without imposing a separate punitive fine.").
See *Outline* at V.E.2.

Adjustments

Abuse of Position of Trust

U.S. v. Lamb, No. 92-2846 (7th Cir. Aug. 27, 1993) (Coffey, J.) (Remanded: It was error to refuse to give § 3B1.3 adjustment for abuse of trust to defendant letter carrier who pled guilty to embezzlement of U.S. mail. "Based on the facts in the case before us, we conclude that a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust."). *See also* U.S.S.G. § 3B1.3, comment. (n.1) (Nov. 1993) ("because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail").
See *Outline* at III.B.8.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Alese, No. 93-1198 (2d Cir. Sept. 28, 1993) (per curiam) (Remanded: "We think the most reasonable interpretation of [18 U.S.C.] § 3565(a) is that a person found to have committed a narcotics-related violation of probation is to be sentenced to a prison term that is at least one-third the length of the maximum prison term to which she could originally have been sentenced." Thus, defendant whose original guideline range was 2–8 months should be resentenced "to a prison term of not less than $2^2/_3$ months and not more than eight months.").
See *Outline* at VII.A.2 and summary of *Sosa* in 6 *GSU* #2.

Rehearing En Banc Granted:

U.S. v. Aguilar, 994 F.2d 609 (9th Cir. 1993) [5 *GSU* #14].
See *Outline* at VI.C.1.e and h, 4.a.

Note to readers: Because the next *Guideline Sentencing: An Outline of Appellate Case Law* will not be issued until February 1994, we include here a list of *Outline* sections that will be significantly affected by some of the Nov. 1993 Guide-lines amendments. This list is designed solely to alert readers to these changes, not to explain them, and does not include all of the new amendments.

Outline Section - Amendment

II.B.1 - The definition of "mixture or substance" in § 2D1.1, comment. (n.1), was revised. Also, a new method for determining the weight of LSD is set forth in § 2D1.1(c)(n.*) and comment. (n.18). Note that these amendments are retroactive under § 1B1.10, p.s.

II.B.3 - A new definition of "cocaine base" is provided in § 2D1.1(c)(n.*).

II.D.1 - § 2B1.1, comment. (n.2), now states that loss does not include interest that could have been earned on stolen funds.

II.E and III.B.6 - § 1B1.1, comment. (n.4), now directs that adjustments from different guideline sections are to be applied cumulatively, absent instruction to the contrary.

III.B.6 - § 3B1.1, comment. (n.2), was added to clarify that the aggravating role adjustment only applies to one who controls other participants, but that an upward departure may be warranted for one who controls only property, assets, or activities.

III.B.8.a - The definition of an abuse of position of trust in § 3B1.3, comment. (n.1), was reformulated.

IV.A.3 - § 4A1.2, comment. (n.6), was amended to clarify that the guideline and commentary are not meant to enlarge a defendant's right to collaterally attack a prior conviction.

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Offense Conduct

CALCULATING WEIGHT OF DRUGS

Tenth Circuit affirms converting powdered cocaine into cocaine base for sentencing where facts showed that object of the conspiracy was to convert powder to crack. Defendant was convicted of eleven drug-related counts, including conspiracy to distribute cocaine base, distribution of cocaine, and manufacture of cocaine base. The presentence report stated that defendant had distributed both cocaine powder and cocaine base. In determining what amounts and kinds of cocaine to attribute to defendant for sentencing, the probation officer concluded that the intent of the conspirators was to distribute the cocaine as cocaine base, and recommended converting the amount of powdered cocaine involved to cocaine base. The sentencing court agreed, finding that the conspirators routinely converted powder cocaine to crack and provided "cooking" instructions for coconspir-ators when necessary. The court sentenced defendant based on the quantity of cocaine base—after the conversion—ultimately distributed, and defendant appealed.

The appellate court affirmed: "According to U.S.S.G. 2D1.4 (1991) [now consolidated into § 2D1.1], '[i]f a defendant is convicted of a conspiracy or an attempt to commit an offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.' The district court made the factual determination that the cocaine powder involved in the conspiracy was routinely converted to crack. The eventual conversion was foreseeable to, if not directed by, Mr. Angulo-Lopez. Under the Guidelines, it is proper to sentence a defen-dant under the drug quantity table for cocaine base if the record indicates that the defendant intended to transform pow-dered cocaine into cocaine base. . . . The record supports the district court's findings that Mr. Angulo-Lopez intended the powdered cocaine to be converted into crack."

See also U.S. v. Paz, 927 F.2d 176, 180 (4th Cir. 1991) (where "a defendant is convicted of conspiracy to manufacture crack, but the chemical seized was cocaine, the district court must . . . approximate the total quantity of crack that could be manufactured from the seized cocaine"); *U.S. v. Haynes*, 881 F.2d 586, 592 (8th Cir. 1989) (for defendant convicted of conspiracy to distribute cocaine, evidence supported finding that defendant sold crack, not cocaine powder, and it was proper to convert seized powder cocaine and currency into crack cocaine for sentencing).

U.S. v. Angulo-Lopez, No. 92-6370 (10th Cir. Oct. 26, 1993) (Brorby, J.).

See *Outline* at II.B.3.

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Watch, No. 91-8671 (5th Cir. Nov. 5, 1993) (Barbour, Chief Dist. J.) (Vacating defendant's conviction, remanding for repleading: District court violated Fed. R. Crim. P. 11 by not informing defendant that, although his indictment purposely omitted alleging drug quantity in order to avoid the mandatory minimum sentences under 21 U.S.C. § 841(b), he could still be subject to a mandatory term after the Guidelines' calculation of quantity. "Because statutory minimum sentences are incorporated in the quantity-based Guidelines, the government is prevented from avoiding application of the statutory minimum sentences prescribed in § 841(b)(1)(A) and (B) by simply failing to include a quantity allegation in an indictment or information in hopes of having the less severe penalty range of § 841(b)(1)(C) applied by default. The failure to include a quantity allegation in an indictment or information has no effect whatsoever on the determination of the appropriate sentence under the Guidelines."

"At the time of Watch's guilty plea, he was not guaranteed application of the sentence range provided for in § 841(b)(1)(C), as represented by the government and accepted by the district court, because the quantity of drugs involved in the offense had yet to be determined. While the district court was not required to calculate and explain the applicable sentence under the Guidelines before accepting Watch's guilty plea . . . , we find that the district court was required to inform Watch of any possible statutorily required minimum sentences he might face as a result of application of the quantity-based Guidelines. . . . The practical consequence of this determination is that a prudent district judge hearing a plea from a defendant charged under an indictment or information alleging a § 841(a) violation but containing no quantity allegation may simply walk a defendant through the statutory minimum sentences prescribed in § 841(b), explaining that a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged.").

See *Outline* at II.A.3 and IX.A.2.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit affirms sentence below statutory minimum in absence of substantial assistance motion as remedy for government's breach of plea agreement. Defendant pled guilty to a drug count under an agreement with the government. In exchange for defendant's cooperation in providing information and testifying against his cousin, the government agreed to inform the district court of his cooperation and "to recommend to the sentencing court that defendant be sentenced to the minimum period of incarceration required by the Sentencing Guidelines." Defendant's guideline range was 41–51 months, but he was sentenced to the applicable five-year mandatory minimum after the government refused to move under 18 U.S.C. § 3553(e) for a lower sentence. Defendant did not appeal, but later moved under 28 U.S.C. § 2255 to vacate

his conviction or correct his sentence. The district court found that the government had breached the plea agreement by not making a § 3553(e) motion and that its continued refusal to recommend departure was in bad faith. The court changed defendant's sentence to 41 months, which it concluded was the sentence called for by the plea agreement.

The appellate court affirmed. The issue here was "what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty. . . . As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" The term "minimum period of incarceration required by the Sentencing Guidelines" was ambiguous because it could be taken to mean the computed guideline range or, as the government argued, the mandatory minimum term, which under § 5G1.1(b) becomes "the guideline sentence."

The appellate court was also persuaded by the fact that, to accept the government's position, it would have to conclude that defendant agreed to cooperate in exchange for no benefit. At the time of the agreement all the sentencing factors were known, and "the parties should have been aware that De la Fuente's guideline sentencing range of 41–51 months would lie entirely below the statutory minimum of 60 months. By providing for a sentencing recommendation in this circumstance, the parties must surely have envisioned a sentence below the statutory minimum. Otherwise, the provision would have served no purpose. . . . We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. Even if we believed that the government in fact acted in such an unfair manner in this case, we would decline to acknowledge and reward such conduct in light of the high standard of fair dealing we expect from prosecutors."

U.S. v. De la Fuente, No. 92-10719 (9th Cir. Oct. 27, 1993) (Reinhardt, J.).

See *Outline* at VI.F.1.b.ii.

Determining the Sentence

Supervised Release

U.S. v. Chukwura, No. 92-8737 (11th Cir. Nov. 1, 1993) (Hatchett, J.) (Affirmed: As a condition of supervised re-lease, the district court had authority to order deportation of foreign national who was already subject to deportation. 18 U.S.C. § 3583(d) "plainly states that if a defendant is sub-ject to deportation, a court may order a defendant deported 'as a condition of supervised release.' The statute then provides that if the court decides to order the defendant's deportation, it then 'may order' the defendant delivered to a 'duly authorized immigration official' for deportation. . . . The lan-guage is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." The appellate court also held that defendant was not denied a deportation hearing: "The Sentencing Guidelines specifically require sentencing courts to address many of the factors that arise at regular INS deportation hearings. While we do not require district courts, contemplating whether to order a defendant deported, to conduct an INS type hearing, we are confident that in this case the sentencing hearing met those requirements.").

See *Outline* at V.C.

General Application Principles

Relevant Conduct

U.S. v. Wishnefsky, No. 93-3009 (D.C. Cir. Oct. 29, 1993) (Ginsburg, J.) (Affirmed: Criminal conduct that occurred outside five-year statute of limitations may be considered as relevant conduct under the Guidelines. District court properly included amounts embezzled from 1980–1986 as "part of the same course of conduct or common scheme or plan" in calculating loss caused by defendant convicted of embezzlement during 1987–1990.).

See *Outline* at I.A.4 and II.D.4.

U.S. v. Sykes, No. 92-2984 (7th Cir. Oct. 22, 1993) (Rovner, J.) (Remanded: Following test for "similarity, regularity, and temporal proximity," it was error to include as relevant conduct fourth fraud count that was dismissed as part of the plea agreement. Without more, general similarity of defendant's attempts to obtain money or credit by using false name and social security number does not comprise "same course of conduct or common scheme or plan" under § 1B1.3(a)(2). Here, defendant's acts, four frauds in a 32-month period, were "not sufficiently repetitive to enable us to call her conduct 'regular'"; the conduct in the fourth count occurred 14 months after the third; and "the acts charged in count IV differ in significant respects from the earlier conduct.").

See *Outline* at I.A.2.

Adjustments

Multiple Counts

U.S. v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (Affirmed: It was proper to group defendant's three mail fraud counts separately from two counts of money laundering (for depositing in a bank the insurance proceeds that were received as a result of the same frauds). The fraud and money laundering counts could not be grouped together under § 3D1.2(a) or (b) because they involved distinct acts and different victims. Defendant contended that all counts should be grouped under § 3D1.2(c) because the knowledge that the money laundered funds were derived from mail fraud "embodies conduct that is treated as a specific offense char-acteristic" in the money laundering guideline. The appellate court held, however, that "[t]he 'conduct' embodied in the mail fraud counts is the various acts constituting the frauds, coupled with the requisite intent to deceive; the 'specific offense characteristic,' in U.S.S.G. § 2S1.2(b)(1)(B), is knowledge that the funds being laundered are the proceeds of a mail fraud. It happens that Lombardi's knowledge of the funds' source derives from the fact that he committed the frauds, but that does not make the fraudulent acts the same thing as knowledge of them." To hold otherwise would allow a defendant to "get exactly the same total offense level whether the defendant committed the mail fraud or merely knew that someone else had committed it.").

See *Outline* at III.D.1.

Acceptance of Responsibility

U.S. v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993) (per curiam) (Affirmed: Nov. 1992 amendment to U.S.S.G. § 3E1.1(b) providing for possible three-point reduction is not retroactive.).

See *Outline* at III.E.4.

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Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Ninth Circuit holds that mandatory minimum penalty in 18 U.S.C. § 3583(g)—revocation of supervised release for drug possession—may not be required when underlying offense was committed before effective date of that section. Defendant committed his offenses in April and May of 1988; he pled guilty and was sentenced in 1990. On Dec. 31, 1988, the supervised release statute was amended to provide that release must be revoked for possession of a controlled substance and the defendant sentenced "to serve in prison not less than one-third of the term of supervised release." 18 U.S.C. § 3583(g). Defendant began serving his supervised release term in Dec. 1990, had it revoked in Aug. 1992 for drug possession, and was sentenced under § 3583(g) to 12 months, one-third of his term of supervised release. The district court ruled that even though defendant's original offenses occurred before § 3553(g) became effective, the conduct that caused the revocation occurred thereafter and the ex post facto clause was not violated by imposing sentence after revocation under § 3553(g).

The appellate court reversed. "We find virtually dispositive the strong line of cases that decides this precise issue in connection with revocation of parole . . . . These cases hold that the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date under a statute that was adopted after the violator committed the underlying offense but before he violated the terms of his parole. For purposes of an ex post facto analysis, there is absolutely no difference between parole and supervised release. . . . In both cases, the question is at what time the prisoner is to be released from prison. A delay in that date constitutes the same punishment whether it is imposed following a parole violation or a violation of supervised release." *Accord U.S. v. Parriett,* 974 F.2d 523, 526–27 (4th Cir. 1992).

U.S. v. Paskow, No. 92-50616 (9th Cir. Nov. 26, 1993) (Reinhardt, J.).

See *Outline* at VII.B.2.

U.S. v. O'Neil, No. 93-1325 (1st Cir. Dec. 15, 1993) (Selya, J.) (Remanded: "We hold that the [supervised release revocation] provision (SRR), 18 U.S.C. § 3583(e)(3), permits a district court, upon revocation of a term of supervised release, to impose a prison sentence or a sentence combining incarceration with a further term of supervised release, so long as (1) the incarcerative portion of the sentence does not exceed the time limit specified in the SRR provision itself, and (2) the combined length of the new prison sentence cum supervision term does not exceed the duration of the original term of supervised release." The district court here exceeded these limits by imposing a two-year prison term plus a new three-year term of supervised release after revoking defendant's original three-year term of release.

In remanding for recalculation of a new revocation sentence, the court added in a footnote that "we today join six other circuits in recognizing [Sentencing Guidelines] Chapter 7 policy statements as advisory rather than mandatory. . . . On remand, the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing." The court reasoned that "although a policy statement ordinarily 'is an authoritative guide to the meaning of the applicable guideline,' *Williams v. U.S.,* 112 S. Ct. 1112, 1119 (1992), the policy statements of Chapter 7 are unaccompanied by guidelines, and are prefaced by a special discussion making manifest their tentative nature."). *But see U.S. v. Lewis,* 998 F.2d 497, 499 (7th Cir. 1993) (Chapter 7 policy statements are binding unless they contradict statute or guidelines) [6 *GSU* #1]. *Cf. U.S. v. Levi,* 2 F.3d 842, 845 (8th Cir. 1993) (finding, in context of ex post facto issue, that Chapter 7 is "a different breed" of policy statement and not binding law) [6 *GSU* #4].

See *Outline* at VII and VII.B.1, summaries of *Truss* and *Tatum* in 6 *GSU* #3.

Departures

CRIMINAL HISTORY

U.S. v. Clark, 8 F.3d 839 (D.C. Cir. 1993) (Remanded: District court departed downward to a sentence within the range that would have applied absent defendant's career offender status. Of the three grounds for departure, one was invalid and two were valid but required further findings. It was improper to depart based on the "unique status of the District of Columbia," wherein the U.S. Attorney controls whether prosecution is brought in local or federal court and defendant likely would have received a much lighter sentence in the local court. This is an exercise of prosecutorial discretion and "is not a mitigating factor within the meaning of 18 U.S.C. § 3553(b)."

Departure because career offender status overrepresents the seriousness of defendant's criminal history may be appropriate, but further findings are required here. Departure on the basis of defendant's lack of guidance as a youth and exposure to domestic violence may also warrant departure. Although the Nov. 1992 amendment to § 5H1.12, p.s., prohibits departure for lack of youthful guidance "and other similar factors," defendant's offense preceded the amendment and its application to his disadvantage would violate the ex post facto clause. *Accord U.S. v. Johns,* 5 F.3d 1267, 1269–72 (9th Cir. 1993). The appellate court cautioned, however, that "there must be

some plausible causal nexus between the lack of guidance and exposure to domestic violence and the offense for which the defendant is being sentenced."

The court further noted that the district court may "consider whether a nexus exists between the circumstances of Clark's childhood and his prior criminal offenses, for purposes of determining whether the seriousness of his criminal record is overrepresented under § 4A1.3." Additionally, "the district court may want to contemplate whether Clark's childhood exposure to domestic violence is sufficiently extraordinary to be weighed under U.S.S.G. § 5H1.3."

Finally, the court held that if the district court properly finds that career offender status overrepresents the seriousness of defendant's criminal history, it may depart to "the criminal history category and offense level that would have been applicable absent the career offender increases." *See also Reyes, infra*.).

See *Outline* at VI.A.2, VI.C.1.b and h.

U.S. v. Reyes, 8 F.3d 1379 (9th Cir. 1993) (Brunetti, J., dissenting) (Remanded: District court had authority to depart downward for career offender based on the overrepresentation of defendant's criminal history and offense compared to most career offenders. "His conduct was not at all of the magnitude of seriousness of most career offenders. . . . Convicted for selling .14 grams of cocaine, he was subject to the same base offense level and sentencing range as if he had sold almost 4000 times that much. 21 U.S.C. § 841(b)(1)(C). Under the career offender guideline a defendant convicted for a fraction of one gram of cocaine is accorded the harshest punishment due an offender trafficking in up to 500 grams. 21 U.S.C. § 841(b)(1)(C)."

The appellate court stressed, however, that the departure was not based on the small quantity of drugs per se: "Instead of emphasizing the absolute quantities of drugs involved, [the sentencing judge] cast the issue of quantity in comparative terms. Reyes' criminal history was 'comparatively minor.' His offenses were 'minor' as compared to others (not small on some absolute scale). . . . Quantity serves merely as the means to compare the similar treatment of defendants whose offenses differ by exceptional orders of magnitude. . . . While . . . the Commission did take into account varying penalties linked to different drug quantities . . . , we conclude that the sentencing ranges resulting in exceptional discrepancies were not adequately considered."

However, the district court did not adequately explain the extent of departure, which was down to the range that would have applied absent career offender status. The appellate court stated that such a departure may be appropriate, but the reasons must be articulated.).

See *Outline* at VI.A.2.

Substantial Assistance

U.S. v. Baker, 4 F.3d 622 (8th Cir. 1993) (Remanded: Defendant pled guilty to a drug charge and agreed to assist the government by providing information about others' drug trafficking. Although she provided some information, the government did not file a § 5K1.1, p.s. motion. The district court departed anyway under § 5K2.0, finding as a mitigating circumstance that "defendant was required to inform the Government of circumstances involving a close relative," which exposed her to family problems and "made it most difficult for the defendant to believe that she had not fulfilled her obligations . . . . The Court finds that, subjectively, the defendant had fulfilled her obligations and was therefore entitled to the 5K1.1."

The appellate court held this was an invalid departure. "The repercussions Baker experienced are mild forms of" the "injury" or "danger or risk of injury" listed as a consideration in § 5K1.1(a)(4), p.s., and "thus were considered by the Sentencing Commission." Defendant's "subjective belief that she had complied with the terms of the cooperation agreement is relevant only to the question of whether she did comply, which is merely a factor a district court should consider when determining the extent of a departure under § 5K1.1, *see* U.S.S.G. § 5K1.1(a)(1)-(3), p.s." The court also held that cooperation with the prosecution "simply cannot be sufficiently extraordinary to warrant a departure under § 5K2.0." The court reasoned that because there are no limits on the extent of a departure under § 5K1.1, "a district court may depart all the way down to a sentence of no imprisonment under § 5K1.1 so long as that departure is 'reasonable' in light of the defendant's assistance. The availability of an unlimited departure proves that § 5K1.1, if it recognizes a defendant's assistance at all, cannot recognize it inadequately.").

See *Outline* at VI.C.1.i, VI.F.1.b.i.

Adjustments

Acceptance of Responsibility

U.S. v. Gonzalez, 6 F.3d 1415 (9th Cir. 1993) (Reversed: District court erred in denying § 3E1.1 reduction because it did not believe defendant's reason for committing the crime. "Under § 3E1.1, Gonzalez was required to recognize and affirmatively accept personal responsibility for his criminal conduct. The record shows he did. . . . Neither § 3E1.1 nor any cases we have found state or otherwise indicate that a defendant's reason or motivation for committing a crime is an appropriate factor to consider in determining whether to grant the adjustment. Even if it were established that Gonzalez at some point in the proceedings lied about why he committed the crimes, this lack of candor . . . should play no part in the district court's § 3E1.1 determination.").

See *Outline* generally at III.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Ballard, 6 F.3d 1502 (11th Cir. 1993) (Affirmed: District court had authority to order that sentence for federal offense—committed by defendant while he was in state jail awaiting trial on state charge—would be consecutive to whatever state sentence defendant received, would not begin until after defendant's release from state custody, and would not be reduced by any time served on the state charge. Although the statute and Guidelines "do not address Ballard's exact situation," see 18 U.S.C. § 3584(a), U.S.S.G. § 5G1.3(a) and (c), they do not preclude the district court's action and, in fact, "evince a preference for consecutive sentences when imprisonment terms are imposed at different times.").

See *Outline* at V.A.2.

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Offense Conduct

Second and Sixth Circuits split on whether drug quantity must be found by the jury or sentencing court when quantity determines whether a conviction for possession of crack is a felony or misdemeanor. Both defendants were acquitted of possession with intent to distribute crack cocaine but convicted of the lesser included offense of simple possession of crack cocaine—a misdemeanor for amounts under five grams if defendant has no prior drug convictions but a felony with a five-year minimum sentence for more than five grams. *See* 21 U.S.C. § 844(a). Neither jury verdict specified the amount of crack that defendants were guilty of possessing. Each district court found there was more than five grams involved and sentenced defendants under the Guidelines. Both defendants appealed, claiming that quantity is an element of the offense and must be found by the jury.

The Second Circuit rejected that claim, holding "that quantity is not an element of simple possession because § 844(a) prohibits the possession of any amount of a controlled substance, including crack. . . . The task of determining how much drugs Monk was carrying falls to the sentencing judge. He, therefore, had to find that Monk possessed more than 5 grams of crack in order to treat the crime as a felony." The appellate court noted that "it is beyond cavil" that more than five grams was involved, since defendant essentially admitted to possessing 340 grams, claiming only that he had no intent to distribute. In addition, the indictment specifically alleged possession of 50 grams and the jury returned a special verdict form of guilty "as charged in the indictment."

U.S. v. Monk, No. 93-1349 (2d Cir. Jan. 24, 1994) (McLaughlin, J.).

The Sixth Circuit, however, concluded that "the amount possessed constitutes an element of the offense." It would be "an impermissible usurpation of the historic role of the jury" to allow a defendant to "be convicted of a felony, as opposed to a misdemeanor, on the strength of a sentencing judge's factual finding on the amount of crack cocaine possessed by the defendant. . . . The felony of which Mr. Sharp was convicted . . . was a 'quantity dependant' crime, . . . and the facts relevant to guilt or innocence of that crime—including possession of a quantity of crack cocaine exceeding five grams—were for the jury to decide." *Accord U.S. v. Puryear*, 940 F.2d 602, 604 (10th Cir. 1991) ("We conclude that drug quantity constitutes an essential element of simple possession under section 844(a). . . . Absent a jury finding as to the amount of cocaine, the trial court may not decide of its own accord to enter a felony conviction and sentence, instead of a misdemeanor conviction and sentence, by resolving the crucial element of the amount of cocaine against the defendant").

U.S. v. Sharp, No. 93-5117 (6th Cir. Dec. 28, 1993) (Nelson, J.).

See *Outline* generally at II.A.3.

Adjustments

Acceptance of Responsibility

Fifth Circuit holds that where defendant met three-part test for additional one-level reduction under § 3E1.1(b), district court had no discretion to deny that reduction because defendant had also obstructed justice. Defendant lied about his prior criminal record in his presentence interview, and was assessed a two-point enhancement for obstruction of justice under § 3C1.1. Despite that, the district court awarded the two-point reduction for acceptance of responsibility. Because of the obstruction, however, the court refused the extra one-point reduction under § 3E1.1(b), which defendant otherwise qualified for because of his timely plea and cooperation.

The appellate court devised a three-step test to determine whether a defendant qualifies for the § 3E1.1(b) reduction. The first two steps, which were not in dispute here, are that a defendant qualifies for the two-point reduction under § 3E1.1(a) and has an offense level of 16 or greater before that reduction. The third step is met by "(1) timely providing complete information to the government concerning his own involvement in the offense, or (2) timely notifying authorities of his intention to enter into a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *See* § 3E1.1(b). The issue here was whether defendant satisfied (2).

Based on the language of § 3E1.1(b) and accompanying Application Note 6, the court concluded "that the timeliness required . . . applies specifically to the governmental efficiency to be realized in two—but only two—discrete areas: 1) the prosecution's not having to prepare for trial, and 2) the court's ability to manage its own calendar and docket, without taking the defendant's trial into consideration. Of equal importance in the instant case is that which the timeliness of step (b)(2) does not implicate: time efficiency for any other governmental function, including without limitation the length of time required for the probation office to conduct its presentence investigation, and the 'point in time' at which the defendant is turned over to the Bureau of Prisons to begin serving his sentence."

Therefore, it was error to deny the extra deduction because defendant's obstruction may have delayed the presentence report and the beginning of his incarceration: "[A]s long as obstruction does not cause the prosecution to prepare for trial or prevent the court (as distinguished from the probation office) from managing its calendar efficiently, obstruction of justice is not an element to be considered. . . . [A] defendant who has satisfied all three elements of subsection(b)'s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction."

U.S. v. Tello, 9 F.3d 1119 (5th Cir. 1993).

In another case, the Fifth Circuit used "the *Tello* test" to reverse a denial of a § 3E1.1(b) reduction. The district court granted a two-level reduction but denied the additional reduction, apparently because it mistakenly thought defendant's offense level was not 16 or higher. The appellate court determined that defendant's offense level "indisputably was above 16" and concluded that defendant also met the third step of the *Tello* test: "Mills clearly took the step defined in subsection (b)(2) when . . . less than a month after his arraignment and only six weeks after he was charged . . . he notified authorities of his intention to enter a plea of guilty. . . . Having thus satisfied all three prongs, Mills was entitled—as a matter of right—to the third 1-level reduction in his offense level. . . . [T]he court was without any sentencing discretion whatsoever to deny Mills the third 1-level decrease." Because "the sentencing court left no doubt that, as far as it was concerned, Mills should be incarcerated for the maximum term permitted under the applicable Guidelines range," instead of remanding the appellate court chose to "reverse the term of incarceration imposed by the district court, modify that term to one of 30 months—the maximum within the correct sentencing range—and affirm Mills' sentence as thus modified."

U.S. v. Mills, 9 F.3d 1132 (5th Cir. 1993).

See *Outline* generally at III.E and X.D.

Departures

Mitigating Circumstances

U.S. v. Newby, No. 92-5711 (3d Cir. Nov. 30, 1993) (Cowen, J.) (Affirmed: The district court properly refused to consider downward departure for inmate-defendants who, in addition to the penalty for their instant offenses, would lose good time credits as an administrative penalty for the same conduct. "Loss of good time credits is not a factor that relates to the defendants' guilt for their conduct; the defendants' being sanctioned administratively does not show that they were morally less culpable of the charged crime. . . . [P]rison disciplinary sanctions through loss of good time credit do not constitute a proper basis for a downward departure." The appellate court refused to follow *U.S. v. Whitehorse*, 909 F.2d 316, 320 (8th Cir. 1990) ("District Court did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case").

See *Outline* generally at VI.C.4.

U.S. v. Crook, 9 F.3d 1422 (9th Cir. 1993) (Remanded: Defendant pled guilty to manufacturing 751 marijuana plants. The district court departed downward two offense levels on the grounds that defendant had grown the marijuana for his personal use and the Guidelines did not take into account that a defendant could lose his home—which was not acquired with proceeds from drug sales—through civil forfeiture. (Note: On this issue the court cited *U.S. v. Shirk*, 981 F.2d 1382 (3d Cir. 1992), as support, but that case has been vacated. See last item.) The appellate court held that "the Guidelines do not allow for departure on account of civil forfeiture." Also, the district court clearly erred in finding that the marijuana was for defendant's personal use. Even using a conservative estimate, it was five times more than defendant could use at his admitted rate of smoking—"we are convinced by the size of Crook's marijuana crop that he must have been manufacturing marijuana, at least in part, for sale or distribution.").

See *Outline* at VI.C.1.i and 4.b.

U.S. v. One Star, 9 F.3d 60 (8th Cir. 1993) (Affirmed: Downward departure to five years' probation for defendant convicted of being a felon in possession of a firearm was properly based on combination of factors and "the unusual mitigating circumstances of life on an Indian reservation noted . . . in *U.S. v. Big Crow*, 898 F.2d 1326, 1331–32 (8th Cir. 1990)." Defendant did not appear to present a danger to the community, especially with a no-alcohol condition of probation. He had strong family ties and responsibilities—including the sole support of nine family members—and a good employment record. Defendant also "submitted a resolution by the Rosebud Sioux Tribe and numerous letters from tribal officers and others praising his work record and contributions to the community and urging that he not be incarcerated." The appellate court also rejected the government's contention "that the degree of departure was unreasonable because it requires a reduction from offense level twenty to offense level eight to make One Star eligible for a sentence of probation. . . . The maximum prison term for a violation of § 922(g)(1) is ten years. *See* 18 U.S.C. § 924(a)(2). Therefore, the district court had statutory authority to sentence One Star to probation. *See* 18 U.S.C. §§ 3559(a), 3561(a). That being so, and its findings being legally sufficient to warrant a departure, the court's decision to impose probation 'is quintessentially a judgment call.' . . . Though the district court's decision to depart and the extent of its departure no doubt approach the outer limits of its sentencing discretion under the Guidelines, we conclude that One Star's sentence was a reasonable exercise of that discretion.").

See *Outline* at VI.C.1.a and e, 3, and D.

Criminal History

Career Offender Provision

U.S. v. Calverley, No. 92-1175 (5th Cir. Dec. 29, 1993) (Garza, J.) (Affirmed: Defendant, convicted of possession of a listed chemical with intent to manufacture a controlled substance under 21 U.S.C. § 841(d)(1), was properly sentenced as a career offender. "[W]e hold that a sentencing court, in determining whether an offense is a controlled substance offense under § 4B1.2(2), may examine the elements of the offense—though not the underlying criminal conduct—to determine whether the offense is substantially equivalent to one of the offenses specifically enumerated in § 4B1.2 and its commentary. . . . [P]ossession of a listed chemical with intent to manufacture a controlled substance . . . is substantially similar to attempted manufacture of a controlled substance, and is therefore a controlled substance offense within the meaning of U.S.S.G. § 4B1.2." The court refused to follow *U.S. v. Wagner*, 994 F.2d 1467, 1474–75 (10th Cir. 1993) [5 *GSU* #14], which held that § 841(d) is not a controlled substance offense under § 4B1.2(2) and should not be treated as an attempt to manufacture a controlled substance.).

See *Outline* at IV.B.2.

Certiorari Granted and Judgment Vacated:

U.S. v. Shirk, 981 F.2d 1382 (3d Cir. 1992), certiorari granted and judgment vacated by *Shirk v. U.S.*, No. 92-1841 (U.S. Jan. 18, 1994), for rehearing in light of *Ratzlaf v. U.S.*, No. 92-1196 (U.S. Jan. 11, 1994). Please delete reference to *Shirk* in *Outline* at VI.C.4.b.

Guideline Sentencing Update

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VOLUME 6 • NUMBER 9 • FEBRUARY 14, 1994

Offense Conduct

DRUG QUANTITY—RELEVANT CONDUCT

Ninth Circuit holds that drugs held solely for personal use should not be used to set offense level for possession with intent to distribute. Defendant pled guilty to possession of cocaine with intent to distribute. He admitted to possessing 80–90 grams, but claimed most of the cocaine was for his personal use and only the 5–6 grams he intended to distribute should be used in sentencing. The district court appeared to agree that personal use amounts should not be used, but determined those amounts could not be distinguished and used the full amount.

The appellate court remanded: "Drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution. Accordingly, we hold that in calculating the base offense level for possession with intent to distribute, the district court must make a factual finding as to the quantity of drugs possessed for distribution and cannot include any amount possessed strictly for personal use."

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993).

See *Outline* at II.A.1.

U.S. v. Roederer, 11 F.3d 973 (10th Cir. 1993) (Affirmed: Following interpretation of "same course of conduct" set out in *U.S. v. Perdomo,* 927 F.2d 111 (2d Cir. 1991), court agreed that defendant's cocaine sales in conspiracy that ended in 1987 were relevant conduct for instant offense of cocaine distribution in May 1992: "We hold that the evidence, when viewed in its entirety, establishes that Roederer was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. Roederer's conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate.").

See *Outline* at I.A.2 and II.A.1.

DRUG QUANTITY—OTHER ISSUES

U.S. v. Tavano, No. 93-1492 (1st Cir. Dec. 29, 1993) (Selya, J.) (Remanded: District court erred when it "formulated a per se rule" that evidence presented at trial controls and refused to consider defendant's evidence regarding drug quantity that differed from the testimony at trial. The appellate court held that "both Fed. R. Crim. P. 32(c)(3)(D) and U.S.S.G. § 6A1.3 require a sentencing court independently to consider proffered information that is relevant to . . . the sentencing determination.").

See *Outline* at II.A.3, IX.D.3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Crowell, 9 F.3d 1452 (9th Cir. 1993) (Affirmed: "[W]e join the other Circuit Courts . . . which have held that the weight of the dilaudid tablet, rather than the weight of the hydromorphone, is the proper measure of drug quantity. . . . We find that use of the gross weight of the tablet is entirely consistent with" *Chapman v. U.S.,* 111 S. Ct. 1919 (1991).). *Accord U.S. v. Young,* 992 F.2d 207, 209–10 (8th Cir. 1993).

See *Outline* at II.B.1.

U.S. v. Coohey, 11 F.3d 97 (8th Cir. 1993) (Remanded: Defendant was sentenced for an LSD offense before, but his appeal came after, the Nov. 1993 amendment to § 2D1.1(c) (providing new method to determine weight of LSD). He challenged the old method of including the carrier medium and also challenged the new method, claiming it was arbitrary and violated the Sentencing Commission's statutory grant of authority. The appellate court reaffirmed prior precedent that upheld use of the carrier medium and also upheld the new method. The case was remanded, however, for the district court to consider whether it should retroactively apply the new method pursuant to § 1B1.10(a).).

See *Outline* at II.B.1.

Adjustments

VULNERABLE VICTIM

Sixth Circuit holds that relevant conduct should not be used for § 3A1.1 adjustment. Defendant was convicted of conspiracy to defraud the IRS by filing false tax returns and claiming fraudulent tax refunds. He convinced several people to assist him, and the government claimed that some of these people were "particularly vulnerable in some way" and that defendant "prey[ed] on their vulnerabilities in recruiting them to his scheme." The district court agreed and imposed § 3A1.1's two-level enhancement.

The appellate court remanded, holding "that the language of section 3A1.1 requires that individuals targeted by a defendant be victims of the conduct underlying the offense of conviction." Here, the victim of the offense of conviction was the government, and while some of the others "may have been 'victimized' by Wright in the sense that he may have taken advantage of them, we do not believe they were victims of the offense."

In addition, because "section 3A1.1 applies only in cases where there is a victim of the offense of conviction, we further hold that a court cannot apply the adjustment based upon 'relevant conduct' that is not an element of the offense of conviction. Section 1B1.3 has no application in a section 3A1.1 adjustment."

U.S. v. Wright, No. 93-3055 (6th Cir. Dec. 14, 1993) (Kennedy, J.).

See *Outline* at III.A.1.b.

OBSTRUCTION OF JUSTICE

U.S. v. Haddad, 10 F.3d 1252 (7th Cir. 1993) (Reversed: It was error to give § 3C1.1 enhancement for allegedly threatening prosecutor and attempting to influence witness. "Neither the factual findings made nor the actual record below support an 'obstruction' enhancement" for attempting to influence the witness. As to the alleged threat, § 3C1.1 "must be interpreted and determined on the basis of the language in

[§] 1B1.3(a)(1)," which holds a defendant responsible for conduct "that occurred . . . in the course of attempting to avoid detection or responsibility for that offense." Thus, it would have to be shown "that the acts of the defendant alleged to obstruct or impede justice were done 'willfully' and with the specific intent 'to avoid responsibility' for the offense for which he was being tried. . . . [E]ven if there was a threat (as to which the record is unclear) it is obvious that such acts were not committed 'in the course of attempting to avoid responsibility for the offense of conviction.'").
See *Outline* at III.C.4.

U.S. v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (Affirmed: Defendant's plea agreement required him to cooperate with government investigators and testify truthfully at a coconspirator's trial. The district court held that defendant gave false testimony that merited a § 3C1.1 enhancement. The appellate court affirmed, holding that "violation of a plea bargain warrants a sentence enhancement for obstruction of justice." *See also U.S. v. Duke*, 935 F.2d 161, 162 (8th Cir. 1991) (enhancement warranted where defendant did not provide truthful information as required by plea agreement). The court also agreed with the Tenth Circuit that § 3C1.1 "applies when 'a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant.' *U.S. v. Bernaugh*, 969 F.2d 858, 861 (10th Cir. 1992).").
See *Outline* at III.C.2 and 4.

Departures

Mitigating Circumstances

U.S. v. Cantu, No. 92-30211 (9th Cir. Dec. 27, 1993) (Reinhardt, J.) (Canby, J., concurring in part) (Remanded: District court erred in holding that Vietnam veteran suffering from post-traumatic stress disorder did not have "significantly reduced mental capacity" for purposes of § 5K2.13, p.s. "'Reduced mental capacity' . . . comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments. . . . Therefore, a defendant suffering from post-traumatic stress disorder, an emotional illness, is eligible for such a departure if his ailment distorted his reasoning and interfered with his ability to make considered decisions." The fact that defendant also had an alcohol problem did not disqualify him for departure. Under § 5K2.13, defendants "are disqualified only if their voluntary alcohol or drug use caused their reduced mental capacity. . . . If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure."

The court also joined other circuits that held "the disorder need be only a contributing cause, not a but-for cause or a sole cause, of the offense. . . . [Section 5K2.13] requires only that the district court find some degree, not a particular degree of causation. . . . [T]he degree to which the impairment contributed to the commission of the offense constitutes the degree to which the defendant's punishment should be reduced."

The court added: "Resolution of disputed facts concerning mental impairment requires more than simply a neutral process. The court's inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as § 5K2.13 implicitly recommends.' *U.S. v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993). Lenity is appropriate because the purpose of § 5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed to the commission of a crime.").
See *Outline* at VI.C.1.b.

U.S. v. White Buffalo, 10 F.3d 575 (8th Cir. 1993) (Affirmed: "Lesser harms" departure under § 5K2.11, p.s., was appropriate for defendant convicted of unlawful possession of an unregistered firearm (a .22 single-shot rifle with shortened barrel). Defendant lived in a remote area of an Indian reservation and used the gun solely to shoot animals that preyed on his chickens. He had been steadily employed for a few years and had no prior arrests or convictions. The appellate court affirmed the conclusion that defendant's actions "were not the kind of misconduct and danger sought to be prevented by the gun statute," and rejected the government's contention that § 5K2.11 should not be applied to possession of shortened unregistered weapons. *Cf. U.S. v. Hadaway*, 998 F.2d 917, 919–20 (11th Cir. 1993) (district court may consider § 5K2.11 departure for defendant convicted of possessing unregistered sawed-off shotgun) [6 *GSU* #4].

The district court erred, however, in finding that departure was also justified under § 5K2.0 for the kind of personal and community factors upheld in *U.S. v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990). The facts were simply "not sufficiently unusual" to support departure. However, "§ 5K2.11 provided a legally sufficient justification for departure in this case," and "the district court reasonably exercised its discretion in imposing probation" after departing from offense level 15 to 8. *Cf. U.S. v. One Star*, 9 F.3d 60, 62 (8th Cir. 1993) (upholding departure to probation from 33–41-month range) [6 *GSU* #8].).
See *Outline* at VI.C.1.a, generally at VI.C.4, and X.A.2.

General Application Principles

Stipulation to Additional Offenses

U.S. v. Saldana, No. 93-10050 (9th Cir. Dec. 20, 1993) (Nelson, J.) (Remanded: Defendant pled guilty to three drug counts; twelve food stamp counts were dismissed, but the stipulation of facts in the plea agreement provided evidence of the food stamp offenses. The district court held that it had discretion whether or not to consider the food stamp counts under § 1B1.2(c) and declined to do so. The appellate court held this was error: "Nothing in the Guidelines, the commentary, or prior decisions of this court support a conclusion that a district court is free to ignore the command of § 1B1.2(c) requiring it to consider additional offenses established by a plea agreement."). *Cf. U.S. v. Moore*, 6 F.3d 715, 718–20 (11th Cir. 1993) (Affirmed: Under § 1B1.2(c), the district court "*was required* to consider Moore's unconvicted robberies, to which he stipulated in his agreement, as additional counts of conviction . . . under section 3D1.4 . . . . Even if the parties had agreed that these unconvicted robberies were to be used . . . in some other way, the district court *was obligated* to consider these unconvicted robberies as it did.").
To be included in *Outline* at I.B.

Criminal History

Other Sentences or Convictions

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993) (Remanded: State deferred sentence that had no supervisory component, and was treated by the district court as a suspended sentence, did not warrant two criminal history points under § 4A1.1(d). "[A] suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence,' as that term is used in § 4A1.1(d)."). *Cf. U.S. v. McCrary*, 887 F.2d 485, 489 (4th Cir. 1989) (because § 4A1.2 requires actual imprisonment to count as "sentence of imprisonment," improper to count suspended sentence with no imprisonment).
See *Outline* at IV.A.5.

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Departures

MITIGATING CIRCUMSTANCES

U.S. v. Tsosie, No. 93-2145 (10th Cir. Jan. 14, 1994) (Godbold, Sr. J.) (Remanded: Downward departure is permissible for voluntary manslaughter defendant where the victim was having an affair with defendant's wife and died after a fight with defendant. First, the district court properly found, under the totality of the circumstances, that defendant's behavior was an aberration—he had "a long history of continuous employment with the Navajo Tribe, . . . a reputation for being economically supportive of his family, [and he] has not been engaged in any prior criminal activity." Second, the victim's conduct "contributed significantly to provoking Tsosie's offense behavior," having "consisted not merely of having an affair with Tsosie's wife but also of being in a vehicle with Tsosie's wife the day after she took her children away and gave a false excuse about her whereabouts. . . . Further, in the ensuing fight, [the victim] took off his belt and hit Tsosie on the nose with it and actively participated in the affray" that led to his death. Thus, it was proper to consider under § 5K2.10(a) that "the victim was of a greater physical size and strength than the defendant," and the facts distinguish this case from *U.S. v. Desormeaux,* 952 F.2d 182 (8th Cir. 1991), and *U.S. v. Shortt,* 919 F.2d 1325 (8th Cir. 1990). Finally, when defendant saw the victim was seriously injured he went for help, then returned and tried to stop the bleeding. "Rendering aid to a victim is a factor that is not considered by the Guidelines." Remand is required, however, because the district court did not adequately explain the departure from the 41–51-month range to a four-month term in a halfway house.).
See *Outline* at VI.C.1.c and g, 3, and 4.a.

U.S. v. Marcello, 13 F.3d 752 (3d Cir. 1994) (Affirmed: Defendant convicted of structuring bank deposits in order to evade reporting requirements was not eligible for downward departure based on aberrant behavior. "Aberrant behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender. . . . The district court correctly applied this standard and found that some pre-planning was required to deposit $9,000.00 each day over a one-week period of time.").
See *Outline* at VI.C.1.c.

AGGRAVATING CIRCUMSTANCES

U.S. v. Torres-Lopez, 13 F.3d 1308 (9th Cir. 1994) (Remanded: Upward departure for high-speed car chase while transporting illegal aliens was improper. Defendant's flight "was only a few minutes and less than five miles long, . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2." Also, defendant did not treat the alien passengers in a dangerous or inhumane manner so as to warrant departure under § 2L1.1, comment. (n.8). "In sum, there is nothing here, aside from the bare presence of illegal aliens, to suggest that Torres-Lopez's flight from authority was in any way extraordinary.").
See *Outline* at VI.B.1.b and j.

Offense Conduct

OTHER DEFENDANTS' DRUG QUANTITIES

U.S. v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (Remanded: "We hold today that relevant conduct as defined in § 1B1.3(a)(1)(B) is prospective only, and consequently relevant conduct under § 1B1.3(a)(1)(B) cannot include conduct occurring before the defendant joins a conspiracy." It was therefore improper to count drug quantities trafficked by the conspiracy before defendant joined it. On remand the district court must determine: "1) when Carreon joined the conspiracy . . . , 2) what drug quantities were within the scope of Carreon's conspiratorial agreement . . . , and 3) of these drug quantities, which were reasonably foreseeable—prospectively only—by Carreon." Defendant's knowledge of the conspiracy's prior conduct may be used, but only as "evidence of what Carreon agreed to and what he reasonably foresaw when he joined the conspiracy.").
See *Outline* at II.A.2.

POSSESSION OF WEAPON BY DRUG DEFENDANT

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: It was error to give drug defendant § 2D1.1(d)(1) enhancement for rifles found in his home. Defendant presented "unrefuted testimony that these rifles were for hunting and were unconnected with the marijuana. . . . The District Court failed to consider that the defendant was charged with a marijuana manufacturing operation. There are no allegations that Zimmer was actively selling the substance from his home. We do not have a situation in which 'drug dealing' was occurring on the premises, during which a weapon might be utilized. None of the weapons were found anywhere near the marijuana." Further, one rifle was disassembled and inoperable, supporting defendant's claim that he was repairing it for a friend, and there was no ammunition in the house for an unloaded second rifle, supporting defendant's assertion that the rifle did not belong to him. "Given the nature of the operation (manufacturing, not dealing), the setting (rural), and the location of the contraband (in basement) away from the weapons, 'it is clearly improbable that the weapon(s) [were] connected with the offense.' U.S.S.G. § 2D1.1, comment.(n.3).").
See *Outline* at II.C.1 and 3.

DRUG QUANTITY

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: In determining relevant conduct, the district court could not assume defendant produced a certain number of plants in the past based only on defendant's admission that he had grown

marijuana before. "The court's determination that the defendant grew an additional 200 plants is not supported anywhere in the record. The District Court may not 'create' a quantity when there is absolutely no evidence to support that amount. An estimate can suffice, but 'a preponderance of the evidence must support the estimate.' . . . The information and equipment seized in the case clearly demonstrates that the 'sophisticated' indoor growing operation was but a few months old. Thus, the size of defendant's operation at the time of arrest cannot be manipulated to infer a certain amount of past 'success' (25 plants per year) when there exists not a scintilla of evidence to support such a finding. That the defendant grew marijuana during the years prior to his arrest is not in question; he admitted as much. The amount attributed to him by the District Court, however, was created from whole cloth. It is improper . . . to simply 'guess.' The relevant conduct enhancement is therefore reversed and the District Court is directed to resentence defendant based on the actual amount of marijuana seized.").
See *Outline* at II.B.4.d and generally at II.A.1.

Adjustments

Official Victim

U.S. v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994) (Affirmed: Enhancement under § 3A1.2(b) for assault on law enforcement officer by a coconspirator was properly given to defendant convicted of drug offenses. Although Application Note 1 to § 3A1.2 indicates there must be a specified "victim" of the offense of conviction, Note 1 should not be applied to subsection (b) because it conflicts with the guideline and accompanying Note 5, both of which were added later.). *Accord U.S. v. Powell,* 6 F.3d 611, 613–14 (9th Cir. 1993) (same, for defendant who assaulted officer during unlawful possession of weapon offense). *See also U.S. v. Gonzales,* 996 F.2d 88, 93 (5th Cir. 1993) (affirmed enhancement where codefendant shot officer).
See *Outline* at I.F and III.A.2.

Obstruction of Justice

U.S. v. Cotts, 14 F.3d 300 (7th Cir. 1994) (Affirmed: Section 3C1.1 enhancement was properly given to defendant who planned to murder a nonexistent informant that undercover agents had blamed for the failure of a drug deal. "The obstruction enhancement is applicable not just to defendants who have actually obstructed justice but also to those who have attempted to do so, . . . and the district court explicitly based [defendant's] enhancement on his attempt, not his success, in obstructing justice. That [defendant] and his coplotters ultimately could not have murdered the fictitious informant does not diminish the sincerity of any efforts to accomplish that end. Futile attempts because of factual impossibility are attempts still the same.").
See *Outline* at III.C.1.

U.S. v. Washington, 12 F.3d 1128 (D.C. Cir. 1994) (Affirmed: Section 3C1.2 enhancement was properly given to defendant who led police on a car chase in an urban area. "In his attempt to escape the police, [defendant] drove in a fast and reckless manner through a series of neighborhood alleys and ended up flipping his car. It was not clearly erroneous for the district court to find that this behavior constituted reckless endangerment during flight.").
See *Outline* at III.C.3.

Violation of Probation

Revocation for Drug Possession

U.S. v. Penn, No. 93-5190 (4th Cir. Feb. 17, 1994) (Ervin, C.J.) (Remanded: Defendant's probation was revoked for drug possession under 18 U.S.C. § 3565(a), subjecting him to imprisonment for "not less than one-third of the original sentence." The district court construed "original sentence" to mean defendant's three-year probation term rather than his 6–12-month guideline range, and sentenced him to 12 months. The appellate court remanded, holding "that the most reasonable interpretation of § 3565(a) is that a person found to have committed a narcotics related violation is to be resentenced to a term of incarceration that is at least one-third but does not exceed the maximum prison term to which the person could have been sentenced" under the Guidelines. Therefore, although defendant could still be sentenced to 12 months, the minimum term required is only 4 months.).
See *Outline* at VII.A.2, summary of *Alese* in 6 *GSU* #5.

Revocation of Probation

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994) (Affirmed: Defendant, originally subject to 33–41-month guideline range but given a five-year term of probation after departure, was properly sentenced after revocation to 33 months instead of the 3–9 months called for by § 7B1.4, p.s. "[T]he policy statements of Chapter 7 are not binding, [although] Forrester is correct in arguing that the sentencing court must consider them. . . . Here, the district court considered Chapter 7. In footnote 1 of its order revoking probation it stated that 'even if [it] sentenced Defendant under Chapter 7, the court would not be bound by the 3–9 month range suggested by Defendant. Commentary note 4 to § 7B1.4 provides that, "[w]here the original sentence was the result of a downward departure (*e.g.,* as a reward for substantial assistance) . . . , an upward departure may be warranted."' Having considered the policy statements of Chapter 7, the court was free to reject the suggested sentence range of 3 to 9 months.").
See *Outline* at VII.

Criminal History

Invalid Prior Convictions

U.S. v. Isaacs, No. 92-2068 (1st Cir. Jan. 25, 1994) (Oakes, Sr. J.) (Remanded: The Guidelines, in § 4A1.2, comment. (n.6 & backg'd) (Nov. 1990), do not provide a sentencing court with independent authority to review the validity of a prior conviction. The Constitution may require such review, but "only where the prior conviction is 'presumptively void.' . . . [A] prior conviction is 'presumptively void' if a constitutional violation can be found on the face of the prior conviction, without further factual investigation. . . . Under limited circumstances, however, a conviction may be 'presumptively void' even if a constitutional violation cannot be found on the face of the prior conviction. . . . Where an offender challenges the validity of a prior conviction on 'structural' grounds"—such as deprivation of certain trial rights or judicial bias—"a district court should entertain the challenge whether or not the error appears on the face of the prior conviction." Here, defendant's challenge should not have been heard because there was no facial invalidity and he did not allege a "structural error" in the prior conviction.) (replacing opinion originally issued June 22, 1993, and reported in 5 *GSU* #15).
See *Outline* at IV.A.3, summary of *McGlocklin* in 6 *GSU* #3.

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Violation of Probation

REVOCATION FOR DRUG POSSESSION

Supreme Court resolves circuit split, holds that the minimum sentence after revocation of probation for drug possession is one-third of the original guideline maximum. Defendant was originally subject to a guideline range of 0–6 months' imprisonment, and was sentenced to a 60-month term of probation. He violated probation by possessing cocaine and was subject to 18 U.S.C. § 3565(a), which states that for "possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence defendant to not less than one-third of the original sentence." The district court interpreted "original sentence" to mean one-third of the probation term, and sentenced defendant to prison for 20 months. The appellate court reversed, holding that "one-third of the original sentence" should be read to mean the maximum sentence available under the original guideline range; thus, defendant should have been sentenced to "not less than" 2 months, with a maximum sentence of 6 months. *See U.S. v. Granderson,* 969 F.2d 980 (11th Cir. 1992). [See *Outline* at VII.A.2 for other circuit holdings.]

The Supreme Court affirmed the appellate court. "According the statute a sensible construction, we recognize, in common with all courts that have grappled with the 'original sentence' conundrum, that Congress prescribed imprisonment as the *type* of punishment for drug-possessing probationers. As to the *duration* of that punishment, we rest on the principle that '"the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended."' . . . The minimum revocation sentence, we hold, is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum."

Two justices concurred in the judgment only, and two justices dissented.

U.S. v. Granderson, No. 92-1662 (U.S. Mar. 22, 1994) (Ginsburg, J.).

Outline at VII.A.2.

Violation of Supervised Release

SENTENCING

U.S. v. Anderson, 15 F.3d 278 (2d Cir. 1994) (Affirmed: After revocation of supervised release, defendant was subject to a statutory maximum of 24 months' imprisonment and a range of 6–12 months under Guidelines Chapter 7. The district court sentenced her to 17 months, stating that it departed from the Guidelines because defendant needed "intensive substance abuse and psychological treatment in a structured environment." The appellate court held that the prohibition in 18 U.S.C. § 3582(a), "that imprisonment is not an appropriate means of promoting correction and rehabilitation" (see also 28 U.S.C. § 994(k)), does not apply to sentencing after revocation of supervised release under 18 U.S.C. § 3583(e). "In determining the length of a period of supervised release, . . . a district court may consider such factors as the medical and correctional needs of the offender. . . . Because [of that], and because a district court may require a person to serve in prison the period of supervised release, the statute contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation . . . . We conclude, therefore, that a court may consider an offender's medical and correctional needs when requiring that offender to serve time in prison upon the revocation of supervised release." (Kearse, J., dissented.)

The court also "declined to extend *Williams [v. U.S.,* 112 S. Ct. 1112 (1992),] to Chapter 7 policy statements," and reaffirmed its pre-*Williams* holding that "Chapter 7 policy statements are advisory, rather than binding. . . . Accordingly, the district court need not 'make the explicit, detailed findings required when it departs from a binding guideline,' . . . [and] we will affirm the district court's sentence provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable." The court found those conditions were met and affirmed the sentence.).

Outline at VII and VII.B.1.

Criminal History

OTHER SENTENCES OR CONVICTIONS

U.S. v. Thomas, No. 92-2112 (8th Cir. Mar. 10, 1994) (en banc) (Hansen, J.) (four judges dissenting) (Affirmed: District court may consider constitutionally valid but uncounseled prior misdemeanor conviction in determining Guidelines sentence. Under *Baldasar v. Illinois,* 446 U.S. 222 (1980) (per curiam), "one cannot be sent to jail because of a prior uncounseled misdemeanor conviction, either upon the initial conviction or because of the conviction's later use in a subsequent sentencing, but if the subsequent sentence to imprisonment is already required as a consequence of the subsequent crime, the prior conviction may be used as a factor to determine its length.").

Outline at IV.A.5.

CAREER OFFENDER PROVISION

U.S. v. Heim, 15 F.3d 830 (9th Cir. 1994) (Affirmed: Disagreeing with *U.S. v. Price,* 990 F.2d 1367 (D.C. Cir. 1993) [5 *GSU* #12], and holding that "the Sentencing Commission did not exceed its statutory authority in including conspiracy within the meaning of 'controlled substance offense' in §§ 4B1.1 and 4B1.2.").

Outline at IV.B.2.

U.S. v. Baker, 16 F.3d 854 (8th Cir. 1994) (Remanded: District court erred in holding that defendant's 21 U.S.C. § 856 conviction for managing or controlling a "crack house" was a "controlled substance offense" for career offender purposes under § 4B1.2(2). Although managing a residence for the purpose of *distributing* a controlled substance would

qualify, managing a residence for the purpose of *using* drugs does not, and the jury's verdict was ambiguous—"it does not clarify whether Baker was convicted of a possession § 856 offense or a distribution § 856 offense. When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range.").
Outline at IV.B.2.

Challenges to Prior Convictions

U.S. v. Mitchell, No. 92-3903 (7th Cir. Feb. 23, 1994) (Flaum, J.) (Affirmed: "[W]e agree with the result reached by the First, Fourth, Sixth, Eighth, and Eleventh Circuits, and hold that a defendant may not collaterally attack his prior state conviction at sentencing unless that conviction is presumptively void, . . . that is a conviction lacking constitutionally guaranteed procedures plainly detectable from a facial examination of the record." The court also determined that, although it and other circuits had found that early versions of Application Note 6 to § 4A1.2 indicated such challenges should be allowed, amendments to the commentary in Nov. 1990 and later have made it clear that the Sentencing Commission did not intend to enlarge a defendant's right to collaterally attack a prior conviction "beyond any right otherwise recognized by law.").
Outline at IV.A.3.

Departures

Criminal History

U.S. v. Fletcher, 15 F.3d 553 (6th Cir. 1994) (Affirmed: Downward departure for career offender—to his offense level before career offender designation and criminal history category V instead of VI—was appropriate. "Fletcher argued that his case was ripe for a downward departure because of his extraordinary family responsibilities, the age of the convictions on his record (1976 and 1985), the time intervening between the convictions, and his attempts to deal with his drug and alcohol problems. Moreover, Fletcher specifically requested the court to compare him 'to other defendants who would typically be career offender material.' Fletcher also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court held "that these circumstances present a satisfactory basis for a downward departure. Fletcher's unrelated past convictions, . . . the type of convictions, his attempts to deal with his alcohol problems, . . . the age of the convictions, and Fletcher's responsibilities to his parents are circumstances that indicate that the seriousness of Fletcher's record and his likelihood of recidivism were over-stated by an offense level of 32 and a criminal history category of VI. . . . While we note that the age of Fletcher's convictions, standing alone, does not warrant a downward departure, a district court may take the age of prior convictions into account when considering a defendant's likelihood of recidivism.").
Outline at VI.A.2.

Mitigating Circumstances

U.S. v. Monk, 15 F.3d 25 (2d Cir. 1994) (Remanded: Defendant, convicted of simple possession of crack but acquitted of possession with intent to distribute, was sentenced to 135 months. The district court concluded that it had no power to depart, although it wanted to because "the interests of justice require it, given the rather harsh result on the facts of this case" due to the inclusion of relevant conduct in setting the offense level. The appellate court concluded that "the sentencing judge failed to appreciate his authority to depart under [18 U.S.C.] § 3553(b). *See U.S. v. Concepcion*, 983 F.2d 369, 385–89 (2d Cir. 1992) (where relevant conduct guideline would require extraordinary increase in sentence by reason of conduct for which defendant was acquitted by jury, district court has power to depart downward) . . . . We repeat that when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered.").
Outline generally at VI.C.4.

U.S. v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (Remanded: District court could not grant downward departure "because of its concern that incarceration of the appellee would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community. We hold that this departure is inconsistent with U.S.S.G. § 5H1.2, which provides that departures based on a defendant's 'vocational skills' are generally not permitted." The court added that "we see nothing extraordinary in the fact that the imprisonment of [the business's] principal for mail fraud and filing false corporate tax returns may cause harm to the business and its employees. The same is presumably true in a great many cases in which the principal of a small business is jailed for comparable offenses.").
Outline at VI.C.1.e.

Determining the Sentence

Supervised Release

U.S. v. Porat, No. 93-1095 (3d Cir. Mar. 3, 1994) (Roth, J.) (Remanded: Home detention was available as a condition of supervised release under § 5C1.1(d) and (e)(3), but the district court could not allow it to be served in Israel. "Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence. To do so, the probation office must closely monitor his actions. In order that the probation office effectively perform its responsibilities, we believe that Porat must serve his home detention in the United States. It is not clear that the probation office could properly insure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel.").
Outline generally at V.C.

Note to readers:

The latest revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, which supersedes the August 1993 issue, has been printed and is being mailed to all recipients of *Guideline Sentencing Update*. Please note the following changes that should be made to your copy:

VII.F.1.b.ii - *U.S. v. Hernandez*, 996 F.2d 62 (5th Cir. 1993), was modified March 7, 1994, to be reprinted at 17 F.3d 78. Please delete the sentence and quote that immediately precedes the citation on p. 87 of the *Outline*. The holding of the case did not change. Also, the citation for *Hernandez* in VI.F.1.a on p. 85 should be changed to 17 F.3d 78.

IX.D.4 - At p. 100, *U.S. v. Tincher*, 8 F.3d 350 (8th Cir. 1993), was withdrawn and replaced by an unpublished per curiam opinion listed at 14 F.3d 603.

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VOLUME 6 • NUMBER 12 • MAY 12, 1994

Determining the Sentence

FINES

Third Circuit holds that a fine—including a departure to a larger fine—may be based on potential future earnings from sale of rights to story of the crime, but the value of those rights must be supported by evidence. Defendants, husband and wife, kidnapped a business executive to hold for ransom. Although the victim died within four days from a wound suffered during the kidnapping, defendants continued their attempts to receive ransom for six weeks, during which time the case generated extensive media coverage. The husband pled guilty to seven felony counts, the wife to two, and both were given lengthy prison terms. They were also subject to fines up to $250,000 under § 5E1.2(c); however, the district court departed and imposed the maximum fines allowed under 18 U.S.C. § 3571—$250,000 for each felony conviction—equaling $1.75 million for the husband and $500,000 for the wife. Both defendants had received offers for the rights to their stories, and the court determined that their potential gains required a departure to "ensure both the disgorgement of any gain from the offense . . . and an adequate punitive fine." *See* U.S.S.G. § 5E1.2, comment. (n.4).

The appellate court remanded because there was no evidence that defendants' rights were worth those amounts, but approved the use of future story rights as a basis for fines and, in an appropriate case, for upward departure. "Future earning capacity is obviously an appropriate factor to consider. . . . At least in cases such as this, when it is a near certainty that the literary and other media rights to the story of a crime are marketable, possible future sales of those rights may be considered when determining whether a defendant is able to pay a fine. . . . [W]e are convinced that, given the facts and circumstances surrounding this highly publicized crime, the district court was realistic in finding that [defendants] might become able to pay a fine in the future."

However, "while it is entirely proper in cases such as this for district courts to look to potential sales of literary and other media rights as a source of future income . . ., the value of those rights must be supported by more than hypothesis or speculation to justify departures from the applicable Guidelines fine range. This is especially so where Congress has chosen to permit only the government to initiate a petition for modification of a fine if circumstances change so that a defendant is truly unable to pay it." The evidence that the husband had the potential ability to pay a $1.75 million fine did not meet the clear and convincing standard of proof the appellate court held was required for a sevenfold departure from the maximum Guidelines fine. *See U.S. v. Kikumura*, 918 F.2d 1084, 1100–02 (3d Cir. 1990) (extreme departures must meet clear and convincing standard). The court also held that, even under the preponderance standard, the facts did not support the finding that the wife could pay a larger fine. *Cf. U.S. v. Wilder*, 15 F.3d 1292, 1300–01 (5th Cir. 1994) (affirming upward departure to $4 million fine because defendant gained at least $2 million and caused losses exceeding $5 million).

U.S. v. Seale, No. 92-5686 (3d Cir. Apr. 7, 1994) (Lewis, J.).

Outline at V.E.1, VI.B.1.a and h, and IX.B.

U.S. v. Robinson, No. 92-10196 (9th Cir. Apr. 4, 1994) (Brunetti, J.) (Remanded: District court must determine defendant's ability to pay fine at the time of sentencing and cannot impose community service as an alternative sanction should defendant prove unable to pay fine after release from prison. "The Guidelines do not state explicitly that the district court must make the [ability to pay] determination at the time of sentencing, but they strongly imply such a requirement. . . . [T]he structure of § 5E1.2 indicates that the district court, before imposing any fine, must determine whether the defendant has established [the] inability" to pay. As to the community service, 18 U.S.C. § 3572(e) states that "the court may not impose an alternative sentence to be carried out if the fine is not paid." The appellate court also noted that, under Guidelines § 5E1.2(f), an alternative sanction such as community service "must be imposed 'in lieu of all or a portion of [a] fine'; community service cannot be imposed as a fallback punishment to be served if the defendant cannot later pay the fine."). *Outline* at V.E.1.

CONSECUTIVE OR CONCURRENT SENTENCES

U.S. v. Kiefer, No. 93-2247 (8th Cir. Apr. 1, 1994) (Loken, J.) (Remanded: Defendant was convicted on a federal firearms charge and, under § 5G1.3(b) and comment. (n.2), was to receive a sentence that was concurrent to his state sentence on related charges, with credit for the 14 1/2 months served on the state sentence. However, he was also subject to a mandatory minimum fifteen-year sentence under 18 U.S.C. § 924(e), and the district court determined that it could not make the sentences completely concurrent by giving full credit for time served because that would effectively put the federal sentence below the mandatory minimum. The appellate court remanded, holding that "§ 924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of the same course of conduct. In these circumstances, although the issue is not free from doubt, we conclude that time previously served under concurrent sentences may be considered time 'imprisoned' under § 924(e)(1) if the Guidelines so provide."). *Outline* generally at V.A.3.

Sentencing Procedure

EVIDENTIARY ISSUES

U.S. v. Beler, No. 92-3970 (7th Cir. Mar. 31, 1994) (Rovner, J.) (Remanded: Agreeing with *U.S. v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993), that "section 6A1.3(a)'s reliability standard must be rigorously applied" to evidence used in

sentencing. Here, a witness made contradictory statements regarding cocaine amounts that were not in the offenses of conviction. The district court included as relevant conduct amounts from one of the witness's higher estimates, but did not "directly address the contradiction and explain why it credit[ed] one statement rather than the other. . . . Before the court relies on the higher estimate, it must provide some explanation for its failure to credit the inconsistent statement. . . . [Defendant] simply has too much at stake for us to be satisfied with a conclusory factual finding based on potentially unreliable evidence." The appellate court also agreed with other circuits that have held that addict-witness testimony should be closely scrutinized: "[T]he district court should have subjected any information provided by [that witness] to special scrutiny in light of his dual status as a cocaine addict and government informant.").
Outline at IX.D.1.

Fed. R. Crim. P. 35(c)

U.S. v. Portin, No. 93-10397 (9th Cir. Apr. 1, 1994) (per curiam) (Remanded: District court exceeded its authority by increasing defendants' fines when it granted their Rule 35(c) motion to reduce their prison sentences to conform to the Rule 11(e)(1)(C) plea agreement. Rule 35(c) "authorizes the district court to correct obvious sentencing errors, but not to reconsider, to change its mind, or to reopen issues previously resolved under the Guidelines, where there is no error." Here, the original fines were properly imposed, and neither defendants nor the government challenged them on appeal.).
Outline at IX.F.

Adjustments

Obstruction of Justice

U.S. v. Fredette, 15 F.3d 272 (2d Cir. 1994) (Affirmed: Defendants, convicted of witness retaliation offenses and sentenced under the "Obstruction of Justice" guideline, § 2J1.2, were properly given § 3C1.1 enhancements for additional attempt to obstruct justice. "We conclude that Application Note 6 (to § 3C1.1) applies to cases in which a defendant attempts to further obstruct justice, provided that the obstructive conduct is significant and there is no risk of double counting. Regardless of whether the defendants in this case were successful in their efforts to obstruct justice, the fact remains that they used a false affidavit in an effort to derail the investigation and prosecution of their respective cases.").
Outline at III.C.4.

Violation of Supervised Release

Sentencing

U.S. v. Sparks, No. 93-3677 (6th Cir. Mar. 22, 1994) (Guy, J.) (Remanded: District court erred in concluding that, under § 7B1.3(f), revocation sentence *must* be consecutive to state sentences imposed earlier for the conduct that caused revocation. Appellate court reaffirmed its holding before *Stinson v. U.S.,* 113 S. Ct. 1913 (1993), that "the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing" in Chapter 7.).
Outline at VII and VII.B.1.

U.S. v. Malesic, 18 F.3d 205 (3d Cir. 1994) (Remanded: Supervised release may not be reimposed after revocation and imprisonment. Thus it was error to revoke defendant's three-year term of release and sentence him to eighteen months' imprisonment to be followed by a three-year term of supervised release.).
Outline at VII.B.1.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Vincent, No. 93-1910 (6th Cir. Mar. 31, 1994) (Milburn, J.) (Affirmed: Because evidence showed that the stalks and seeds of marijuana plants contain "a detectable amount of the controlled substance," § 2D1.1(c)(n.*), "the stalks and seeds need not be separated before the controlled substance can be used. Accordingly, the stalks and seeds are to be used in calculating the weight of a controlled substance.").
Outline at II.B.2.

U.S. v. Tucker, No. 93-2806 (7th Cir. Mar. 23, 1994) (Wood, J.) (Affirmed: District court correctly used weight of cocaine base at time of arrest for Guidelines and mandatory minimum sentence purposes, rather than the smaller weight when reweighed several months later. It was undisputed that the weight loss was due to the evaporation of water, and water is part of the drug "mixture," not an excludable carrier medium or waste product.).
Outline at II.B.1.

More Than Minimal Planning

U.S. v. Bridges, No. 93-3175 (10th Cir. Mar. 17, 1994) (McKay, J.) (Remanded: Defendant participated in two burglaries and pled guilty to theft of government property from the second burglary. The district court enhanced the sentence for more than minimal planning under § 2B1.1(b)(5), solely on the ground that defendant's conduct "involv[ed] repeated acts over a period of time," § 1B1.1, comment. (n. 1(f)). The appellate court remanded, finding that the examples given in Note 1(f) "demonstrate that the Guidelines equate 'repeated' with 'several,'" meaning "more than two." Thus, when a district court "bases the two-point increase solely on the 'repeated acts' language of the Guidelines, there must have been more than two instances of the behavior in question.").
Outline at II.E.

Departures

Substantial Assistance

U.S. v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994) (Remanded: In reducing defendant's sentence under Fed. R. Crim. P. 35(b) for substantial assistance, the district court erred in considering defendant's "status as a first time offender, his lack of knowledge of the conspiracy until just prior to arrest, his relative culpability, and his prison behavior. . . . The plain language of Rule 35(b) indicates that the reduction shall reflect the assistance of the defendant; it does not mention any other factor that may be considered.").
Outline at VI.F.4.

Changes to previously reported cases:

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994), *withdrawn* and revised opinion filed Mar. 25, 1994. Holding is essentially the same as reported in 6 *GSU* #10.

U.S. v. Calverley, 11 F.3d 505 (5th Cir. 1993), *reh'g en banc granted* Feb. 18, 1994. See 6 *GSU* #8 and *Outline* at IV.B.2.

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Criminal History

CHALLENGES TO PRIOR CONVICTIONS

Supreme Court holds that defendant has no right to challenge prior conviction used to enhance sentence under 18 U.S.C. § 924(e) unless right to counsel was denied. Defendant was convicted of possession of a firearm by a felon and subject to a mandatory minimum sentence of fifteen years under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because he had three prior state convictions for violent felonies. He challenged two of the convictions, claiming ineffective assistance of counsel and that his guilty pleas were not knowing and voluntary. The district court held there was no statutory right to challenge the prior convictions and no constitutional right to challenge except for complete denial of counsel. The Fourth Circuit affirmed, adding that constitutional challenges may be allowed "when prejudice can be presumed from the alleged violation," but not, as here, when the violation "necessarily entails a fact-intensive inquiry." *U.S. v. Custis*, 988 F.2d 1355, 1363–64 (4th Cir. 1993).

The Supreme Court also affirmed, finding first that nothing in § 924(e) authorizes collateral attacks. "The statute focuses on the fact of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." The Court also held that the Constitution requires that challenges be allowed only for a complete denial of counsel, not for claims such as defendant's. "Ease of administration" and an "interest in promoting the finality of judgments" were also cited by the Court. The Court recognized, however, "that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. . . . If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences."

U.S. v. Custis, No. 93-5209 (U.S. May 23, 1994) (Rehnquist, C.J.) (three justices dissenting).

Note: Although this case concerns § 924(e) rather than the Guidelines use of prior convictions, some circuits have not distinguished between the two. *See, e.g., U.S. v. Medlock*, 12 F.3d 185, 187–88 n.4 (11th Cir. 1994) ("The rationale underlying our decision is equally applicable to both Sentencing Guidelines cases and those originating in . . . § 924(e)"); *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) (holding earlier decision in *Custis* "is controlling of our disposition" in challenge under Guidelines). *But cf. U.S. v. Paleo*, 9 F.3d 988, 989 (1st Cir. 1992) (in rejecting challenge under § 924(e), finding Guidelines cases inapposite because "Guideline provision arises in a different legal context and uses language critically different from" § 924(e)). This decision will also affect application of the Guidelines Armed Career Criminal provision, § 4B1.4, which applies to defendants "subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)."

Outline at IV.A.3.

JUVENILE CONVICTIONS AND SENTENCES

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Affirmed: District court properly held that prior conviction under Youth Corrections Act was not "expunged" for Guidelines purposes. The conviction had been "set aside" under the YCA, but "the 'set aside' provision should not be interpreted to be an expungement under § 4A1.2(j) in calculating a defendant's criminal history category. The Commentary to § 4A1.2(j) explains that convictions which are set aside for 'reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction,' are not expunged for purposes of this Guideline and can be included in Criminal History Category determinations. Because the YCA conviction here was set aside for 'reasons unrelated to innocence or errors of law,' it was properly utilized in the criminal history calculation."). *See also U.S. v. McDonald*, 991 F.2d 866, 871–72 (D.C. Cir. 1993) ("set aside" in D.C. statute similar to YCA is not "expunged" under Guidelines). *Contra U.S. v. Kammerdiener*, 945 F.2d 300, 301 (9th Cir. 1991) (conviction "set aside" under YCA was "expunged" under § 4A1.2(j)). *Cf. U.S. v. Doe*, 980 F.2d 876, 881–82 (3d Cir. 1992) (reversing denial of motion for expungement, holding "set aside" in YCA means "a complete expungement").

Outline at IV.A.4.

Sentencing Procedure

PLEA BARGAINING—DISMISSED COUNTS

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Remanded: "Counts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure. . . . To allow consideration of dismissed counts in an upward departure eviscerates the plea bargain. Such consideration allows the prosecutor to drop charges against a defendant in return for a guilty plea and then turn around and seek a sentence enhancement against that defendant for the very same charges in the sentencing hearing. . . . We adopt the reasoning outlined by the Ninth Circuit that a sentencing court should not be allowed to violate the bargain worked out between the defendant and the government. . . . Consideration of dismissed counts as relevant conduct is explicitly allowed by the Guidelines. However, the bar to considering dismissed counts in making upward departures remains an important limitation in the modified real-offense sentencing approach of our current sentencing program. Allowing consideration of dismissed offenses would bring us much closer to the type of pure real-offense sentencing system explicitly rejected by the Guidelines.") (Davis, J., dissenting).

Outline at VI.B.2.b and IX.A.1.

Departures

Mitigating Circumstances

Third Circuit approves departure based on defendant's anguish at involving his son in fraud offense. Defendant tried to solve his company's cash-flow problems through false progress reports to receive accelerated payments from the government, and later did not return unearned payments that had resulted from mistaken double billing. In the first instance he had his son prepare reports to aid the scheme, apparently without the son's knowledge of the fraud. Defendant's efforts notwithstanding, the company eventually went bankrupt and the frauds were discovered. Defendant pled guilty to conspiracy to defraud the government, his son to aiding and abetting a false statement. The district court departed downward one level for defendant (allowing home confinement and probation instead of imprisonment), finding that the amount of loss calculated under § 2F1.1 overstated defendant's criminality and that the Guidelines did not account for the effect on defendant of having unintentionally caused his son to be convicted of a crime.

The appellate court remanded because the district court clearly erred by not imposing a more than minimal planning enhancement and failed to adequately explain the departure, but affirmed the grounds of the departure. While the government did suffer a large loss, the loss overstated defendant's criminality because defendant intended not to steal money but rather to expedite payments that would have eventually been due the company. And, without the takeover of his company and subsequent bankruptcy, "it is quite possible that the loss to the United States would have been far less."

"The other reason for the district court's departure was the mental anguish Monaco felt seeing his son, otherwise a law-abiding citizen with an excellent future, convicted of a crime because of his father's fraudulent scheme . . . [and thereby] stigmatized, not for deliberately committing a criminal act, but for dutifully and unquestioningly honoring his father's request. . . . In at least some cases, such as the district court found here, a defendant who unwittingly makes a criminal of his child might suffer greater moral anguish and remorse than is typical. . . . [W]e think the Sentencing Commission did not consider this issue when it promulgated the Guidelines.

"Moreover, we do not believe that by promulgating U.S.S.G. § 5H1.6, the Sentencing Commission foreclosed the possibility of a downward departure in this extraordinary situation. That section specifically states that family ties and responsibilities are 'not ordinarily relevant' for departure purposes. 'Not ordinarily relevant' is not synonymous with 'never relevant' or 'not relevant.' . . . In the unusual facts and circumstances of this extraordinary case, . . . it is entirely probable that Monaco never intended to criminalize his son and was deeply and legitimately shocked and remorseful when it happened. This is not something that is likely to occur frequently, and when it does, the interests of justice weigh more heavily against overpunishing the defendant than they do in favor of rigidly enforcing the Guidelines without regard for legitimate penological bases of sentencing." The court also noted that "the defendant is a productive, non-violent offender and a small downward departure would eliminate the need for incarceration entirely."

U.S. v. Monaco, No. 93-5261 (3d Cir. May 10, 1994) (Nygaard, J.).
Outline at VI.C.1.a and 4.a, VI.B.1.k.

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: For defendant who otherwise did not qualify for substantial assistance departure under § 5K1.1, it was error to depart downward under § 5K2.13 on the basis that his diminished capacity rendered him incapable of providing substantial assistance to the government. "[T]he Guidelines consider diminished capacity, but limit its relevance to the effect on the defendant's commission of the offense. Guidelines § 5K2.13 does not authorize consideration of the effect of a defendant's diminished capacity on his ability to provide substantial assistance." The case was remanded "for a determination whether Munoz-Realpe's mental incapacity contributed to the commission of his offense" sufficiently to warrant departure under § 5K2.13.).
Outline at VI.C.1.b, generally at VI.F.1.b.i

U.S. v. O'Brien, 18 F.3d 301 (5th Cir. 1994) (Remanded: Defendant's post-conviction community service, including musical performances and benefit shows, did not justify a downward departure. Defendant's activities reflect skills he developed as a professional musician, and educational and vocational skills and employment record do not support departure under §§ 5H1.2, 5H1.5, p.s.).
Outline generally at VI.C.4.b.

Substantial Assistance

U.S. v. Gerber, No. 93-5057 (10th May 9, 1994) (Ebel, J.) (Affirmed: It was not a violation of the Ex Post Facto Clause to apply stricter version of § 5K1.1 that was in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than the earlier version in effect when defendant committed her offenses. "Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted. Thus, the retroactivity analysis turns on which version of 5K1.1 was in effect when she participated in the numerous briefings with federal agents—not when she committed the unlawful conduct to which she pled guilty.").
Outline at I.E and VI.F.3.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: Defendant guilty of importing six liquor bottles containing a liquid that tested positive for cocaine base must be sentenced under guideline for cocaine hydrochloride rather than that for cocaine base. The Nov. 1993 amendment to § 2D1.1(c) (n.*) states: "'Cocaine base,' for the purposes of this guideline, means 'crack.'" Thus, the appellate court held, "forms of cocaine base other than crack are treated as cocaine hydrochloride." The court also held that it would use the new Guidelines definition in determining whether to apply a mandatory minimum sentence under 21 U.S.C. § 960(b), contrary to an earlier decision that all forms of cocaine base were included in § 960(b): "[W]e think it is proper for us to look to the Guidelines in the mandatory minimum statute, especially since both provisions seek to address the same problem. . . . There is no reason for us to assume that Congress meant for 'cocaine base' to have more than one definition." *But cf. U.S. v. Palacio*, 4 F.3d 150, 154 (2d Cir. 1993) (recognizing narrower definition of cocaine base for Guidelines, but stating amendment would not affect broader definition used for mandatory minimum sentences under 21 U.S.C. § 841(b)).).
Outline at II.B.3.

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VOLUME 6 • NUMBER 14 • JUNE 29, 1994

Criminal History

OTHER SENTENCES OR CONVICTIONS

Supreme Court affirms use of prior uncounseled misdemeanor convictions in criminal history score. Defendant challenged the addition of one criminal history point for a prior state misdemeanor conviction—driving under the influence—for which he was fined $250 but not incarcerated. He was not represented by counsel and claimed that use of an uncounseled misdemeanor conviction to increase his guideline sentence violated his Sixth Amendment rights as construed in *Baldasar v. Illinois,* 446 U.S. 222 (1980). The appellate court affirmed, concluding that *Baldasar* limits the use of a prior uncounseled misdemeanor conviction only when it would convert a later misdemeanor into a felony, and thus its use in the criminal history score was proper. *See U.S. v. Nichols,* 979 F.2d 402, 415–18 (6th Cir. 1992).

The Supreme Court affirmed while overruling *Baldasar*. "[A]n uncounseled conviction valid under *Scott [v. Illinois,* 440 U.S. 367 (1979),] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. . . . Today we adhere to *Scott v. Illinois, supra,* and overrule *Baldasar*. Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."

Nichols v. U.S., 114 S. Ct. 1921 (1994) (three justices dissented).

Outline at IV.A.5.

CAREER OFFENDER PROVISION

Circuits continue to split on whether career offender guideline covers drug conspiracies. Two circuits recently agreed with *U.S. v. Price,* 990 F.2d 1367 (D.C. Cir. 1993), that § 4B1.1 does not apply to drug conspiracy defendants despite the inclusion of conspiracy as a predicate offense in § 4B1.2, comment. (n.1). The Sentencing Commission "mistakenly interpreted [28 U.S.C. §] 994(h) to include convictions for drug conspiracies. . . . Because the Commission promulgated section 4B1.1 under the authority of 28 U.S.C. § 994(h), it is invalid to the extent that its scope exceeds the reach of that section of the statute. The guideline should not have been applied to the [drug conspiracy] defendants herein." *U.S. v. Bellazerius,* No. 93-3157 (5th Cir. June 17, 1994) (Politz, C.J.) (remanded). *See also U.S. v. Mendoza-Figueroa,* No. 93-2867 (8th Cir. June 27, 1994) (Gibson, Sr. J.) (remanded: "There is no indication that the Commission intended to rely on its discretionary authority under section 994(a) to extend the section 994(h) mandate. Rather, it is evident that the Commission simply exceeded the language of section 994(h).") (Bartlett, Dist. J., dissented).

Conversely, three circuits recently disagreed with *Price* and agreed with *U.S. v. Heim,* 15 F.3d 830 (9th Cir. 1994), that the Commission had the authority to include conspiracy pursuant to its general authority under 28 U.S.C. § 994(a). *See U.S. v. Damerville,* No. 93-3235 (7th Cir. June 14, 1994) (Pell, J.) (affirmed: "Commission properly exercised its authority in including conspiracy to violate [21 U.S.C.] § 841 among the [controlled substance] offenses that qualify a defendant for career offender status"); *U.S. v. Hightower,* No. 93-5117 (3d Cir. May 31, 1994) (Nygaard, J.) (affirmed: "Reference in the commentary to § 994(h) as a specific source of authority does not preclude the authority of § 994(a). . . . [T]he commentary's expansion of the definition of a controlled substance offense to include inchoate offenses is not 'inconsistent with, or a plainly erroneous reading of' section 4B1.2(2) . . . [and] it does not 'violate[ ] the Constitution or a federal statute'"); *U.S. v. Allen,* No. 92-1225 (10th Cir. May 5, 1994) (Seymour, J.) (affirmed: "Commission could rely on the broader language of section 994(a) . . . to include conspiracy-related offenses in the career offender guideline").

See *Outline* at IV.B.2 and summary of *Heim* in 6 *GSU* #11.

ARMED CAREER CRIMINAL

U.S. v. Oliver, 20 F.3d 415 (11th Cir. 1994) (Remanded: "[P]ossession of a firearm by a convicted felon does not constitute a 'violent felony' within the meaning of [18 U.S.C.] § 924(e), and thus cannot be considered a predicate prior conviction for purposes of sentence enhancement under § 4B1.4." Although, as § 4B1.4, comment. (n.1) states, the definition of "violent felony" in § 924(e) is "not identical to the definition of 'crime of violence'" in § 4B1.1, "we conclude that the two expressions are not conceptually distinguishable for purposes of the narrow question raised in this appeal." Under § 4B1.2, comment. (n.2), "crime of violence" does not include possession of a firearm by a felon, and "[i]t is reasonable to suggest that conduct which does not pose a 'serious potential risk of physical injury to another' for purposes of §§ 4B1.1 and 4B1.2 similarly cannot pose such a risk with respect to § 924(e) and § 4B1.4.").

Outline at IV.D.

Offense Conduct

MANDATORY MINIMUM SENTENCES

U.S. v. Rodriguez-Sanchez, No. 93-50198 (9th Cir. May 3, 1994) (Reed, Sr. Dist. J.) (Remanded: In determining drug amounts for mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) for defendant convicted of possessing methamphetamine with intent to distribute, § 841(a)(1), district

court may not include amounts possessed for personal use, only the amount defendant intended to distribute. In *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993), the court held that, under the Guidelines, "[d]rugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution." The court here stated that, "[a]lthough the specific holding of *Kipp* is not technically binding upon us, the principle behind that decision guides our decision. We are dealing with the same crime, possession with intent to distribute. The legislative intent behind the mandatory minimum sentencing provisions of § 841(b) are not necessarily identical with those behind the Sentencing Guidelines but they are similar. . . . [Section] 841(a)(1) does not criminalize mere possession of drugs, only possession with intent to distribute. . . . Other statutes deal with the crime of possession. . . . Thus, the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession.").

See *Outline* at II.A.1 and 3.

Departures

Substantial Assistance

U.S. v. Martin, No. 93-6477 (4th Cir. May 25, 1994) (Hamilton, J.) (Remanded: "[I]f at the time of sentencing, the government deems the defendant's assistance substantial, the government cannot defer its decision to make a U.S.S.G. § 5K1.1 motion on the ground that it will make a Fed. R. Crim. P. 35(b) motion after sentencing. Instead, the government at that time must determine—yes or no—whether it will make a U.S.S.G. § 5K1.1 motion. If the government defers making a U.S.S.G. § 5K1.1 motion on the premise that it will make a [Rule] 35(b) motion after sentencing, the sentence that follows deprives a defendant of due process, and is therefore 'in violation of law.'" *Accord U.S. v. Drown,* 942 F.2d 55, 58–60 (1st Cir. 1991). The remedy for such a violation is normally a remand to give the government "the opportunity to consider afresh the substantiality of the defendant's assistance at the time of sentencing." Here, however, during the sentencing hearing the government agreed defendant had rendered substantial assistance and effectively promised to make a substantial assistance motion "within the next year," which was "tantamount to and the equivalent of a modification of the plea agreement." On remand, then, defendant "is entitled to specific performance of the government's promise to reward him for his presentence substantial assistance." Note that the government did make a Rule 35(b) motion within a year, but the district court ruled that under the terms of Rule 35(b) it had no power to grant the motion because defendant did not actually provide any *post*-sentencing assistance.).

Outline at VII.F.1.b.ii, 3, and 4.

Criminal History

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: Extent of upward departure for defendant in criminal history category VI was proper. The court departed from defendant's offense level 12 and 23 criminal history points, a guideline range of 30–37 months, "by adding one offense level for each criminal history point above the thirteen points required to reach category VI, and assessing four additional levels for [other] reasons." The appellate court found that the reasons for departure "are adequate and the extent of departure is reasonable and not an abuse of discretion.").

Outline at VI.A.4.

Mitigating Circumstances

U.S. v. Pacheco-Osuna, No. 93-50199 (9th Cir. May 2, 1994) (Remanded: It was error to depart downward for immigration defendant because his arrest might have been invalid. Although defendant did not challenge his arrest, the district court found "he may have been stopped because he was Mexican looking, rather than [for] good cause." The appellate court held that whether defendant's arrest was illegal was "a factor entirely unrelated to [his] crime (entry after deportation) or to his criminal history . . . . Even if the stop . . . had not been proper, that was not related to his culpability or to the severity of his offense. Sentencing is not designed to punish, deter or educate errant government officials.").

Outline at VI.C.4.b.

U.S. v. Haversat, 22 F.3d 790 (8th Cir. 1994) (Remanded: Downward departure for antitrust defendant was proper for "truly exceptional family circumstances." Defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening," his presence was crucial to her treatment, and there was testimony that even a short separation could threaten her health. *Accord U.S. v. Gaskill,* 991 F.2d 82, 84–86 (3d Cir. 1993). However, the court abused its discretion by departing five levels and declining to impose any kind of confinement or even probation, imposing only a fine. The court should "craft a sentence that imposes some form of confinement to meet the expressed goal of § 2R1.1 and that still takes into consideration [defendant's] need to be available to render care to his wife," such as intermittent confinement or home detention.).

Outline at VI.C.1.a.

General Application Principles

Relevant Conduct—Other Issues

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: "Appellant argues that the district court erred in including a stolen U.S. Treasury check . . . as relevant conduct under § 1B1.3(a)(1)(A) and (B) . . . . Appellant argues that because the check is the basis of a pending state prosecution against him, it should not be included as relevant conduct in the current federal proceeding. We disagree. . . . The Second Circuit has considered the issue . . . and has ruled that information from a pending state prosecution on a related offense may be used as relevant conduct. *U.S. v. Caceda,* 990 F.2d 707, 709 (2d Cir. 1993). We agree.").

Outline at I.A.4.

Adjustments

Acceptance of Responsibility

U.S. v. Colussi, 22 F.3d 218 (9th Cir. 1994) (Remanded: Agreeing with *U.S. v. Tello,* 9 F.3d 1119 (5th Cir. 1993), that if a defendant meets the test for the extra one-level reduction under § 3E1.1(b), it must be granted: "The language mandates a one point reduction where the requirements of § 3E1.1(b) are met." Here, defendant satisfied the first two parts of the test, but the district court apparently "believed it had discretion whether to consider th[e] third step. This was error.").

Outline at III.E.5.

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VOLUME 6 • NUMBER 15 • JULY 20, 1994

Offense Conduct

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Boot, No. 93-2317 (1st Cir. June 7, 1994) (Cyr, J.) (Affirmed: Nov. 1993 amendment to § 2D1.1(c) that changed method of calculating weight of LSD controls for guideline calculations, but for mandatory minimum sentences the calculation is still controlled by the holding in *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), that the weight of the carrier medium is included. Therefore, defendant resentenced under § 1B1.10(a) could not have his sentence reduced below the applicable five-year mandatory minimum, based on the weight of the LSD plus the carrier medium, even though his guideline range was reduced from 121–151 months to 27–33 months.). *Cf. U.S. v. Mueller*, No. 93-1481 (10th Cir. June 22, 1994) (Moore, J.) (Affirmed: Defendant, originally sentenced to five-year mandatory minimum that was later reduced to 39 months after Fed. R. Crim. P. 35(b) departure, was not entitled to resentencing under amended LSD calculation in § 2D1.1(c). Under § 1B1.10(b), the district court "should consider the sentence that it would have originally imposed had the guidelines, *as amended*, been in effect at that time." Here, even though amended § 2D1.1(c) would result in a range of 18–24 months, defendant was still subject to five-year minimum term, and the "subsequent reduction upon the government's Rule 35 motion, which occurred at a later date, has no concomitant retrospective applicability.").
Outline at II.A.3 and II.B.1.

U.S. v. Telman, No. 93-3324 (10th Cir. June 30, 1994) (Baldock, J.) (Affirmed: Defendant pled guilty to an LSD offense and, following a § 5K1.1 motion by the government, had his offense level reduced from 29 to 15 and was sentenced below the five-year statutory minimum to 18 months. Following § 1B1.10(a), he later sought resentencing under the Nov. 1993 amendment on calculating weight of LSD in § 2D1.1(c), claiming that his offense level would be 15 following the amended guideline, that the district court would have departed downward from level 15 instead of ending there, and that his sentence would therefore be lower. The district court denied the motion and was affirmed. "[I]t is apparent from the language of 1B1.10(a)—*i.e.*, 'may consider'—that a reduction is not mandatory but is instead committed to the sound discretion of the trial court. . . . [T]he district court considered a number of [the factors in 18 U.S.C. § 3582(c)], including Defendant's post-amendment guideline range, and decided that due to Defendant's personal and offense characteristics, Defendant did not merit a sentence reduction. After reviewing the record, we cannot say the district court abused its discretion.").
Outline at I.E and II.B.1.

Adjustments

ACCEPTANCE OF RESPONSIBILITY (§ 3E1.1(b))

U.S. v. Kimple, No. 92-10735 (9th Cir. June 24, 1994) (Nelson, J.) (Remanded: It was error to deny reduction under § 3E1.1(b)(2) on the grounds that over a year passed before defendant's guilty plea and he filed a pretrial motion to suppress evidence. "Because constitutionally protected conduct should not be considered against the defendant for purposes of an acceptance of responsibility reduction, . . . a defendant's exercise of those rights at the pretrial stage should not in and of itself preclude a reduction for timely acceptance. . . . If the Government establishes that it prepared for trial in conjunction with responding to pretrial motions, denial of the reduction may be justified. However, where the record reflects only the Government's efforts in responding to such motions, as [here], then the trial court may not deny the additional reduction for timely acceptance simply because a defendant vigorously defended a motion to suppress or simply because a given length of time has elapsed prior to the defendant noticing his intent to plead guilty. . . . [W]e do not consider the length of time that has passed in isolation," and here, in what the trial court called a complex case, there were several continuances, the government filed two superseding indictments, defendant's pretrial motions were not frivolous or filed for purposes of delay, and no trial date had been set.).

U.S. v. Stoops, No. 93-10244 (9th Cir. June 1, 1994) (Beezer, J.) (Remanded: Defendant's multiple confessions on day of robbery and leading police to evidence qualified him for the extra reduction under § 3E1.1(b)(1), despite the government's claim that these actions did not "assist[] authorities in the investigation or prosecution" of his offense because the information was readily available to police. "[S]ubsection (b) does not require that the defendant timely provide information that authorities would not otherwise discover or would discover only with difficulty; it requires merely that the defendant 'assist' the authorities by timely providing complete information or by timely notifying them of his intent to plead guilty. . . . Multiple consistent confessions on the day of arrest ordinarily serve such a purpose."

"The government also argues that Stoops does not qualify for . . . § 3E1.1(b) because Stoops challenged the admissibility of his confessions in pretrial motions to suppress[, reasoning] that a confession does not qualify a defendant for the reduction unless its admissibility goes unchallenged. This theory conflates subsections (b)(1) and (b)(2). These subsections are separated by the connective 'or,' not 'and.' A defendant qualifies under subsection (b)(1) if he timely provides complete information, whether or not he moves to suppress or timely notifies the government of his intent to plead guilty.

. . . Although the motions may have delayed his notice of intent to plead guilty, they could not have delayed his confessions, which had already occurred.").

U.S. v. McConaghy, 23 F.3d 351 (11th Cir. 1994) (per curiam) (Remanded: "Section 3E1.1(b)(2) is not facially unconstitutional." However, to avoid an unconstitutional *application* of § 3E1.1(b)(2), the district court must determine whether defendant's notification was timely in light of the circumstances, not simply whether the government had already engaged in trial preparation: "Avoiding trial preparation and the efficient allocation of the court's resources are descriptions of the desirable consequences and objectives of the guideline. They are not of themselves precise lines in the sand that solely determine whether notification was timely. . . . Application must bear in mind the extent of trial preparation, the burden on the court's ability to allocate its resources efficiently, and reasonable opportunity to defense counsel to properly investigate.").
Outline at III.E.5.

Departures

Mitigating Circumstances

U.S. v. Minicone, No. 93-1594 (2d Cir. June 8, 1994) (Miner, C.J.) (Remanded: "[W]e hold that where independent factors have been adequately considered by the Sentencing Commission and each factor considered individually fails to warrant a downward departure, the sentencing court may not aggregate the factors in an effort to justify a downward departure" under a "totality of circumstances" test.).
Outline at VI.C.3.

Criminal History

U.S. v. Rodriguez-Martinez, No. 91-10220 (9th Cir. June 1, 1994) (O'Scannlain, J.) (Remanded: In departing upward to 136 months for defendant subject to 120-month statutory minimum, the district court did not indicate how it calculated the departure above defendant's guideline range of 63–78 months and then above the mandatory minimum. The "existence of a mandatory minimum sentence does not alter the manner in which a district court determines the appropriate extent of a departure: a court must determine a defendant's offense level and appropriate criminal history category, including departures from the recommended criminal history category, just as it would in an ordinary case. If the resulting sentencing range is under the statutory minimum, the district court must give the mandatory minimum sentence; if the sentencing range includes the statutory minimum, the district court may impose a sentence above the mandatory minimum."). *But cf. U.S. v. Carpenter*, 963 F.2d 736, 745–46 (5th Cir. 1992) (affirming as reasonable under the circumstances departure to 230 months where district court used 180-month mandatory minimum sentence as starting point for departure calculation, rather than guideline range of 33–41 months).
Outline at VI.A.3.a.

U.S. v. Thomas, No. 93-5514 (6th Cir. May 23, 1994) (Merritt, C.J.) (Affirmed: Upward departure based on "inordinately high criminal history score of 43" was proper. "Thomas's score of 43, one of the highest we could find in reported cases, is clearly sufficiently unusual to warrant departure from the guidelines." The extent of departure was also proper even though the district court did not "consider and reject each of the six intermediate gridblocks between the original guideline range . . . and the range in which the actual sentence fell . . . ," as defendant argued it must do for departures above CHC VI. "Neither the Guidelines nor the law of this circuit require the district court to provide a mechanistic recitation of its rejection of the intervening, lower guideline ranges. Section 4A1.3 . . . indicates quite clearly that the court should continue to consider ranges 'until it finds' an appropriate sentence for the defendant before it, but nothing in § 4A1.3 calls for a more detailed, gridblock-by-gridblock approach advocated by the defendant. . . . The approach required of the sentencing court when departing beyond Criminal History Category VI, as we see it, is to consider carefully all of the facts and circumstances surrounding the case which affect the departure, and from them determine an appropriate sentence for the particular defendant.").
Outline at VI.A.4.

Determining the Sentence

Restitution

U.S. v. Meacham, No. 93-1692 (6th Cir. June 15, 1993) (Martin, J.) (Remanded: The Victim Witness and Protection Act "does not authorize a district court to order restitution for the government's costs of purchasing contraband while investigating a crime, even if the defendant explicitly agreed to such an order in a plea agreement. . . . While the Act provides that a 'court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement,' 18 U.S.C. § 3663(a)(3), this Court has held that the repayment of the cost of investigation is not 'restitution' within the meaning of the Act." *See Gall v. U.S.*, 21 F.3d 107, 111–12 (6th Cir. 1994) ("such investigative costs are not losses, but voluntary expenditures by the government for the procurement of evidence"; also holding that restitution imposed as a condition of supervised release is still subject to VWPA)). *But cf. U.S. v. Daddato*, 996 F.2d 903, 904–06 (7th Cir. 1993) (affirming "a condition in the nature of restitution on a sentence of supervised release" that defendant repay government's cost of purchasing drugs from defendant, including drugs from charges that were dismissed or never charged, reasoning that this payment is valid under supervised release statute's "catch-all provision," 18 U.S.C. § 3583(d), and not subject to VWPA).
Outline at V.D.2.

Violation of Supervised Release

Revocation for Drug Possession

U.S. v. Meeks, No. 93-1708 (2d Cir. June 2, 1994) (Kearse, J.) (Remanded: Defendant whose supervised release was revoked for drug possession should not have been sentenced under the mandatory provision of 18 U.S.C. § 3583(g) when his original offense occurred before that section's effective date (Dec. 31, 1988): "[A]ny provision for punishment for a violation of supervised release is an increased punishment for the underlying offense. Thus, where the underlying offense was committed prior to the effective date of § 3583(g), application of that section violates the Ex Post Facto Clause.").
Outline at VII.B.2.

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General Application Principles

RELEVANT CONDUCT—DOUBLE JEOPARDY

Fifth Circuit holds defendant may be tried for offense that was used as relevant conduct in prior sentencing. Defendant was part of a conspiracy that attempted to import 591 kilograms of cocaine in Aug. 1990. He was not arrested then, but was arrested later for the conspiracy's Feb. 1991 possession of 375 pounds of marijuana with intent to distribute. When defendant was sentenced for the marijuana offense the cocaine was included as relevant conduct, increasing his guideline range from 63–78 months to 292–365 months, but he was sentenced to 144 months after a § 5K1.1 departure. Defendant was then indicted for the cocaine offense, but the district court dismissed the indictment, holding that punishment for that offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment. *See also U.S. v. Koonce*, 945 F.2d 1145, 1149–54 (10th Cir. 1991) (double jeopardy violated by punishing same conduct that was previously included as relevant conduct); *U.S. v. McCormick*, 992 F.2d 437, 439–41 (2d Cir. 1993) (following *Koonce*, affirmed dismissal of charges).

The appellate court remanded, finding that Congress had authorized multiple punishments through the Guidelines. Section 5G1.3(b) (added after the *Koonce* decision), requires concurrent sentences when a prior offense has "been fully taken into account in the determination of the offense level for the instant offense," and thus "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him again for all relevant conduct. . . . [W]e are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding." The court held there is "no basis for distinguishing the situation described by § 5G1.3(b)"—in which an earlier offense is fully taken into account in sentencing for the instant offense—from the reverse situation presented here.

The court also rejected defendant's claim that, because the § 5K1.1 motion from the first case will not apply to the second, it is unfair to allow the government to seek what will actually be a longer (although concurrent) sentence than if both offenses had been tried together and sentenced under § 3D1.2(d). *See* § 1B1.1(d) & (i) (indicating § 5K departures are considered after offenses have been grouped). If defendant is convicted, the court noted, "the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses," and he may be subject to a concurrent sentence of 292–365 months, depending on adjustments.

U.S. v. Wittie, 25 F.3d 250 (5th Cir. 1994). *See also U.S. v. Cruce*, 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: not a double jeopardy violation to indict defendants in Texas on bank fraud conspiracy charges that include loan transaction that was used as relevant conduct when defendants were sentenced in Kansas on other bank fraud charges; Kansas and Texas conspiracies are separate offenses, and "we hold that Congress has not (in the Sentencing Guidelines) evinced the clear intent necessary to preclude punishment for a separate and distinct offense, even though the underlying conduct has been used previously to enhance another sentence. . . . [I]t chose only to *limit* punishments in the second proceeding [through § 5G1.3(b)]—not to preclude that proceeding and the consequent punishment altogether").
Outline at I.A.4.

Offense Conduct

LOSS

U.S. v. Goodchild, 25 F.3d 55 (1st Cir. 1994) (Affirmed: Inclusion of late fees and finance charges in credit card fraud loss is not prohibited by § 2F1.1, comment. (n.7). "We hold that in a case involving the fraudulent use of unauthorized credit cards, finance charges and late fees do not come within the meaning of the Commentary phrase 'interest the victim could have earned on such funds had the offense not occurred.' This phrase, we think, refers to opportunity cost interest. In a credit card case there is an agreement between the company and the cardholder to the effect that when payments are made late, or not at all, the cardholder is subject to late fees and finance charges. This is part of the price of using credit cards. The credit card company has a right to expect that such fees and charges will be paid. This is not 'interest that the victim could have earned on such funds had the offense not occurred.'"). *See also U.S. v. Henderson*, 19 F.3d 917, 928–29 (5th Cir. 1994) (Interest on fraudulently obtained loans was properly included: "Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction." Note 7 "sweeps too broadly and, if applied in this case would be inconsistent with the purpose of § 2F1.1.").
Outline at II.D.

ESTIMATING DRUG QUANTITY

U.S. v. Hendrickson, No. 92-1386 (2d Cir. June 13, 1994) (Sotomayor, Dist. J.) (Remanded: Where defendant produced only 77 grams of heroin over a two-year period, his initial expression of intent to import 50–60 kilograms of heroin was not sufficient to show he intended and was able to produce that amount. Under former § 2D1.4, comment. (n.1), "where the

Government asserts that a defendant negotiated to produce a contested amount, we hold that the Government bears the burden of proving the defendant's intent to produce such an amount, a task necessarily informed, although not determined, by the defendant's ability to produce the amount alleged to have been agreed upon. . . . [W]e do not, at least in a conspiracy case, require sentencing courts to exclude from consideration only those drug amounts which the defendant neither intended to produce nor was reasonably capable of producing. Instead, we shift the sentencing guideline § 2D1.4 analysis back to its proper focus—the 'object of the conspiracy.' In other words, courts must consider the amount of drugs the conspirators agreed to produce. . . . [D]efendant's ability, which includes that of his coconspirators, to produce specific amounts of narcotics, is highly relevant in determining whether the conspirators agreed to produce these amounts." The court added that this analysis would apply to § 2D1.1, comment. (n.12).) (Winter, J., dissented.).
Outline at II.B.4.a.

U.S. v. Pion, 25 F.3d 18 (1st Cir. 1994) (Affirmed: Despite district court's finding that defendant was not "reasonably capable of producing" additional three kilograms he negotiated, that amount was properly included as relevant conduct under § 2D1.1, comment. (n.12), because "he was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective. . . . [N]either conjunctive clause in note 12 can be ignored." Also, defendant's "inability to produce the additional three kilograms was no impediment to its imposition of the ten-year minimum sentence mandated by statute. . . . Absent a statutory alternative, . . . we think application note 12 provides the threshold drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. § 841(b)(1)(A)(ii)."). *But cf. U.S. v. Legarda,* 17 F.3d 496, 500 (1st Cir. 1994) ("Our case law has followed the language of this Commentary Note in a rather faithful fashion, requiring a showing of both intent and ability to deliver in order to allow the inclusion of negotiated amounts to be delivered at a future time.").
Outline at II.B.4.a.

Determining the Sentence

Restitution

U.S. v. Gibbens, 25 F.3d 28 (1st Cir. 1994) (Remanded: It was error to order restitution to cover loss to government involved in defendant's illegal purchase of food stamps from undercover agent at one quarter their face value. Although the government can be a "victim" under the Victim and Witness Protection Act, its application in this situation is unclear and "nothing in the legislative history of either the organic Act or it amendments indicates that losses incurred in government sting operations should be subject to recoupment under the VWPA." Thus the appellate court invoked the rule of lenity to hold that "a government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA. . . . [However,] other methods of recovery remain open to the government, notably fines or voluntary agreements for restitution incident to plea bargains.").
See *Outline* at V.D.2 and summary of *Meacham* in 6 *GSU* #15.

Adjustments

Obstruction—Reckless Endangerment

U.S. v. Young, No. 93-50186 (9th Cir. June 7, 1994) (Hug, J.) (Remanded: Reckless endangerment enhancements for defendants who did not drive during high-speed chase were improper without specific findings that, pursuant to § 3C1.2, comment. (n.5), defendants "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the driver's reckless conduct. "[T]he government must establish that the defendants did more than just willfully participate in the getaway chase. It must prove that each defendant was responsible for or brought about the driver's conduct in some way. Such conduct may be inferred from the circumstances of the getaway, . . . and the enhancement may be based on conduct occurring before, during, or after the high-speed chase. . . . Thus, enhancement under section 3C1.2 requires the district court to engage in a fact-specific inquiry.").
Outline at III.C.3.

Role in the Offense

U.S. v. Smaw, 22 F.3d 330 (D.C. Cir. 1994) (Remanded: A "GS-7 time and attendance clerk" did not occupy a position of trust within the meaning of § 3B1.3's amended commentary. Although defendant clearly abused her position, it was not "a position of public or private trust characterized by professional or managerial discretion" and she was not "subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature," as is now required under Application Note 1. Although defendant was sentenced before Nov. 1, 1993, the amended Note should be applied because it is clarifying, rather than substantive.).
Outline at III.B.8.a.

Criminal History

Consolidated or Related Cases

U.S. v. Hallman, 23 F.3d 821 (3d Cir. 1994) (Remanded: Defendant's prior sentence for forgery should not have been counted in the criminal history score for the instant conviction for possession of stolen mail because the two offenses were related as "part of a single common scheme or plan," § 4A1.2(a)(2), comment. (n.3). "[A]ll of the stolen mail . . . was in the form of checks or credit cards and [the check in the prior forgery offense] was from a sequence of blank checks found within the stolen mail. Therefore, it is reasonable to infer that the mail was stolen to find checks or other instruments that could be converted to use through forgery." Noting that "intent of the defendant is a crucial part of the analysis," the court distinguished *U.S. v. Ali,* 951 F.2d 827, 828 (7th Cir. 1992), because there the defendant had no prior intent to forge a money order he obtained in the robbery of a supermarket.).
Outline at IV.A.1.b.

Sentencing Procedure

Unlawfully Seized Evidence

U.S. v. Kim, 25 F.3d 1426 (9th Cir. 1994) (Affirmed: Drugs seized during an illegal search may be included as relevant conduct where the search was not carried out for the purpose of increasing defendant's offense level. The appellate court left open the question whether suppression "would be necessary and proper" if evidence was illegally obtained for the purpose of increasing a defendant's guideline sentence.).
Outline at IX.D.4.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Departures

CRIMINAL HISTORY

U.S. v. Hines, No. 92-30441 (9th Cir. June 20, 1994) (Trott, J.) (Remanded: It was proper to depart upward under §§ 5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state"—evidenced by serious and repeated threats of future violence—and the resulting "significant likelihood that he will commit additional serious crimes." The case is distinguishable from *U.S. v. Doering*, 909 F.2d 392 (9th Cir. 1990), because the court did not base the departure on defendant's need for psychiatric treatment but on the "extraordinary danger to the community" he represented. And, because it was an extraordinary circumstance under § 5K2.0, the prohibition in § 5H1.3 did not preclude departure. However, although the district court may depart by offense levels since the departure was based on both §§ 5K2.0 and 4A1.3, it must explain why it chose three levels instead of one or two.).

Outline generally at VI.A.3.a and VI.B.1.i.

MITIGATING CIRCUMSTANCES

U.S. v. Walker, No. 93-50621 (9th Cir. June 21, 1994) (Farris, J.) (Affirmed: Agreeing with reasoning of *U.S. v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (Guidelines do not authorize downward departure on basis of suicidal tendencies), and holding that "post-arrest emotional trauma, or, what [defendant] refers to as 'self-inflicted punishment,' does not constitute a valid basis for departure.").

Outline at VI.C.1.b and i.

U.S. v. Amor, 24 F.3d 432 (2d Cir. 1994) (Affirmed: Downward departure for duress, § 5K2.12, was permissible for defendant convicted of three counts related to an illegal weapon and one count of retaliating against a witness. Defendant obtained the weapon after damage to his car and threats related to a labor dispute. The retaliation count arose from his repeated threats against a coworker who had informed police that defendant had the illegal weapon. The retaliation count had the highest offense level and thus controlled the guideline range under § 3D1.2's grouping rules. The government argued "(a) that 'offense' as used in § 5K2.12 should be interpreted as referring only to the offense that controlled a defendant's offense level for his entire group of offenses, (b) that Amor's controlling offense was the retaliation offense, and (c) that such duress as existed related only to the firearm offenses, not to the retaliation offense," thus making departure improper. The appellate court held that this was "too narrow a view of what it means for an offense to be committed 'because of' duress for the purposes of § 5K2.12. . . . The evidence was sufficient to support the finding that Amor had received a clear threat of physical injury and substantial property damage from the unlawful actions of unidentified parties. . . . [T]he relationship between the gun acquisition and the threats was close enough that it was fair for the court to conclude that there was a causal nexus between the original duress and the eventual threats of retaliation.").

Outline at VI.C.1.g.

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Valentine, 21 F.3d 395 (11th Cir. 1994) (Remanded: Basing upward departure on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns v. U.S.*, 111 S. Ct. 2182 (1991). "Contemporaneous—as opposed to advance—notice of a departure, at least in this case, is 'more a formality than a substantive benefit,' . . . and therefore is inherently unreasonable." Notice is required "to warn the defendant to marshal facts by which he may contest the evidence that ostensibly supports the proposed upward departure." Here, for example, the departure was "premised on several unsupported factual assumptions" that defendant was unaware of until the sentencing hearing. "If Valentine had been given notice that the district court was contemplating a departure on these 'facts,' he would have had notice and opportunity to argue against the court's mistaken factual conclusions; without such notice, this opportunity was lost.").

Outline at VI.G.

Offense Conduct

DRUG QUANTITY

U.S. v. de Velasquez, No. 93-1674 (2d Cir. June 22, 1994) (McLaughlin, J.) (Affirmed: For defendant who imported heroin by carrying it internally, it was proper to also include heroin hidden in her shoes that she claimed she did not know was there. "[I]n a possession case the sentence should be based on the total amount of drugs in the defendant's possession, without regard to foreseeability. . . . [A] defendant who knows she is carrying some quantity of illegal drugs should be sentenced for the full amount on her person."). See also *U.S. v. Imariagbe*, 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; and, while "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," that is not the case here); U.S.S.G. § 1B1.3, comment. (n.2) ("defendant is accountable for all quantities of contraband with which he was directly involved," and reasonable foreseeability "does not apply to conduct that the defendant personally undertakes").

Outline at II.A.1.

CALCULATING WEIGHT OF DRUGS—MARIJUANA

U.S. v. Stevens, 25 F.3d 318 (6th Cir. 1994) (Remanded: It was error to calculate marijuana distributor's offense level by using the number of plants his supplier grew rather than the weight of the marijuana distributed. The "equivalency provision" in § 2D1.1(c) at n.*, which treats each plant as the equivalent of one kilogram of marijuana when more than

one hundred plants are involved, should be applied "only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute 'relevant conduct' that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived.").
Outline at II.B.2.

More Than Minimal Planning

U.S. v. Kim, 23 F.3d 513 (D.C. Cir. 1994) (Affirmed: Section 2B1.1(b)(5) enhancement could not be applied to defendant's two acts of obtaining blank power of attorney forms—"'repeated acts' in the description of more than minimal planning contemplates at least three acts." *Accord U.S. v. Bridges,* – F.3d – (10th Cir. Mar. 17, 1994) ("repeated" means "more than two") [6 *GSU* #16]; *U.S. v. Maciaga,* 965 F.2d 404, 407 (7th Cir. 1992) (dicta indicating same). However, the enhancement was proper here because defendant twice obtained falsely notarized documentation, which may be considered as "significant affirmative steps . . . taken to conceal" his false bank loan applications.).
Outline at II.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Quinones, 26 F.3d 213 (1st Cir. 1994) (Remanded: "[W]e hold that a sentencing court possesses the power to impose either concurrent or consecutive sentences in a multiple-count case. We also hold, however, that . . . a sentencing court's decision to abjure the standard concurrent sentence paradigm should be classified as, and must therefore meet the requirements of, a departure. It follows that a district court only possesses the power to deviate from the concurrent sentencing regime prescribed by section 5G1.2 if, and to the extent that, circumstances exist that warrant a departure.").
Outline at V.A.1.

Fines

U.S. v. Gomez, 24 F.3d 924 (7th Cir. 1994) (Affirmed: Although defendants "appeared to be penniless at the time of sentencing," fines could be imposed based on defendants' likely future wages in prison. Bureau of Prisons regulations "permit prisoners to keep half of their wages no matter what their obligations; the other half, however, is available for alimony, civil debts—and fines. 28 C.F.R. sec. 545.11(a)(3). Neither the text of the regulations nor any of defendants' arguments suggests that funds available to pay civil debts should be unavailable to pay criminal debts."). *Accord U.S. v. Tosca,* 18 F.3d 1352, 1355 (6th Cir. 1994) (indigent defendant "can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program").
Outline at V.E.1.

Adjustments

Obstruction of Justice

U.S. v. Johns, No. 92-1775 (2d Cir. June 13, 1994) (Jacobs, J.) (Remanded: During his presentence interview defendant denied involvement in any drug transactions other than those charged in his indictment. The district court held the denials were false and imposed a § 3C1.1 enhancement. "The government contends that these are not simply denials of guilt, but affirmative statements of materially false information. We conclude, however, that they do constitute 'denials of guilt' and therefore may not be deemed obstruction of justice . . . . There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. It is indisputable that [Application] Note 1 limits retribution for denials of guilt that are false; therefore, there can be no moral dimension to the matter of how that false denial may be framed. . . . Within the context of § 3C1.1, every denial of guilt will be materially false. Note 1 removes this sort of false statement from the ambit of the Guidelines provision. . . . The language of Note 1 is clear—absent perjury, a defendant may not suffer an increase in his sentence solely for refusing to implicate himself in illegal activity, irrespective of whether that refusal takes the form of silence or some affirmative statement denying his guilt.") (Altimari, J., dissented).
Outline at III.C.2.c and 5.

U.S. v. Vegas, No. 93-1375 (2d Cir. June 13, 1994) (Leval, J.) (Affirmed: Where jury apparently rejected defendant's "innocent explanation" by finding him guilty, the government argued that *U.S. v. Dunnigan,* 113 S.Ct. 1111 (1993), required the district court to make a finding as to whether defendant committed perjury and thereby merited a § 3C1.1 enhancement. The appellate court disagreed: "*Dunnigan* does not say that every time a defendant is found guilty despite his exculpatory testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, that opinion clearly states that when the court wishes to impose the enhancement over the defendant's objection, the court 'must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.' . . . *Dunnigan* does not suggest that the court make findings to support its decision against the enhancement.").
Outline at III.C.2.a and 5.

U.S. v. Woods, 24 F.3d 514 (3d Cir. 1994) (Remanded: Because § 3C1.1 "applies only when the defendant has made efforts to obstruct the investigation, prosecution, or sentencing of the offense of conviction," it may not be given to defendant who lied to FBI and grand jury about whether two friends participated in robbery that he was not convicted of. There was evidence defendant participated in that robbery, but he was not indicted for it and pled guilty to two other robberies. Departure is not proper either, because the Sentencing Commission "appears to have considered false statements like those involved here, and elected not to punish them as part of the conviction for the instant offense." The court added: "The result we reach is regrettable . . . [b]ut we are bound by the language of § 3C1.1 and its application notes.").
Outline at III.C.4.

Role in the Offense

U.S. v. Okoli, 20 F.3d 615 (5th Cir. 1994) (Affirmed: Nov. 1993 amendment clarifies that defendant need not personally lead five or more participants to receive § 3B1.1(a) enhancement; leading at least one of the five is sufficient. *See* § 3B1.1, comment. (n.2) ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.").
Outline at III.B.2.c.